(1) Supreme Court, U.S.
FILED

991030 DEC 15 1999

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No.

IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND STEPHEN GOLDSMITH, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,

Petitioners,

v.

JAMES EDMOND, JOELL PALMER, ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

GARY DAMON SECREST
Counsel of Record
THOMAS E. SATROM
OFFICE OF CORPORATION COUNSEL
CONSOLIDATED CITY OF INDIANAPOLIS
200 E. Washington Street
Indianapolis, IN 46204
(317) 327-4055

Counsel for Petitioners

92 pp

QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a "narcotics detection" dog around the exterior of each stopped automobile are unlawful under the Fourth Amendment.

LIST OF PARTIES

All of the parties to the proceedings in the court below are included in the caption on the cover page of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Indianapolis, Indiana, and Stephen Goldsmith, in his official capacity as Mayor of the City of Indianapolis, Indiana, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported 183 F.3d 659. The opinion of the district court (Pet. App. 24a-48a) is reported at 38 F.Supp.2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1999. A timely petition for rehearing was denied on August 18, 1999. Pet. App. 51a-52a. On November 1, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 16, 1999. *See* Application No. 99A356. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States, made applicable to the States by the Due Process Clause of the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

1. In August 1998, the Indianapolis Police Department (IPD) began operating a "checkpoint" program. Under that program, motorists were briefly stopped and examined in order to determine whether they were impaired and whether their driving documentation was in order. A major goal of those checkpoints was to discover narcotics traffickers—ordinarily, by walking a drug detection dog around the perimeter of a stopped car while the motorist's documentation was being checked—and thus to interrupt the flow of illegal narcotics through Indianapolis. Pet. App. 25a-27a.

The checkpoint program was administered in accordance with written procedures promulgated in advance by the IPD. Pet. App. 26a-27a. The locations of the checkpoints were selected weeks in advance by IPD supervisors (or more senior personnel) "based on geographical suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which [would] minimize the interference with normal traffic flow * * *." *Id.* at 56a. Drivers approaching each of those pre-determined locations were warned, with lighted signs, that they should be prepared to stop for a "narcotics checkpoint" and that a "narcotics K-9" would be in use. *Id.* at 57a. Moreover, only a pre-determined number of cars approaching a given checkpoint location was stopped. All other traffic was permitted to continue without interruption until the last of the vehicles initially stopped was processed.

Once the last of the initially stopped cars left, a new group of motorists (the same predetermined number) was stopped. No deviations from that procedure were permitted. *Id.* at 29a, 57a.

Each motorist who was stopped at a checkpoint was approached by police officers, at least one of whom was in full uniform. An officer asked for, and examined, the motorist's driver's license and motor vehicle registration. The officer also looked for any signs of impairment, such as alcohol odors, slurred speech or disorientation. Pet. App. 27a. While the motorist's documentation was being checked, a drug detection dog was walked around the perimeter of the car. *Id.* at 57a. If the motorist's documentation proved to be in order, and there was no cause for any further detention (such as signs of impairment, a positive dog "alert," or the discovery of outstanding warrants), the motorist was allowed to proceed without further delay. *Id.* at 57a. The City endeavored to operate the checkpoints so that no motorist was stopped for more than five minutes (unless grounds for a longer detention were discovered during the stop). The average stop lasted only two to three minutes. *Id.* at 28a, 57a.

The City conducted six roadblocks, in accordance with its program, between August and November 1998. In total, 1,161 vehicles were stopped and 104 motorists were arrested—an effectiveness or "hit" rate of 9%. Those arrests were divided approximately equally between narcotics offenses (55 arrests) and other crimes (49 arrests). Pet. App. 3a.

2. Respondents Edmond and Palmer, who each alleged that he had been illegally stopped at one of the City's roadblocks, commenced the instant action, on be-

half of themselves and other similarly situated motorists, in the United States District Court for the Southern District of Indiana. Respondents alleged that the City had "violated the Fourth Amendment by using roadblocks to seize motorists without individualized suspicion for the primary purpose of determining if they possess or are under the influence of illegal drugs." Pet. App. 32a. They sought an injunction prohibiting further use of the checkpoints. *Id.* at 25a.

The parties stipulated to the material facts surrounding the operation of the roadblocks (Pet. App. 26a-27a & n.2), and also stipulated that the case should be certified as a class action on behalf of all motorists subject to being stopped at roadblocks "maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drugs and unlawful drug use." *Id.* at 30a. The district court certified the proposed class pursuant to Fed. R. Civ. P. 23(b)(2), but it denied respondents a preliminary injunction on the ground that the City's roadblock program is clearly constitutional under the Fourth Amendment. Pet. App. 34a-48a.

The district court first concluded that the constitutionality of the roadblocks should be analyzed under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979), and it expressly rejected respondents' contention that any balancing of the interests implicated by a stop is permissible only when the government demonstrates a "special need" beyond the ordinary need to enforce the criminal laws. Pet. App. 34a. The court explained that in upholding the constitutionality of sobriety checkpoints, this Court held that no such showing is required in "'cases dealing with police stops of motorists on

public highways.'" *Id.* at 34a-35a, quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990).

Turning to the balance of interests involved, the court concluded that the City's interest in interdicting narcotics users and traffickers not only is "beyond serious dispute" but also—given the sizable proportion of arrests—is significantly advanced by the checkpoints. Pet. App. 35a-36a. With respect to the intrusion on individual motorists, the court noted that law-abiding motorists clearly would know that the stops are officially authorized, and thus would not be unduly alarmed by them, and that the IPD's guidelines adequately restrict the discretion conferred on law enforcement officers. *Id.* at 36a-38a. The court also concluded that detaining a motorist briefly to check his license and registration "is fairly non intrusive," and that any intrusion from "having a dog sniff the exterior of a motorist's vehicle," though "warrant[ing] a closer look," is "similar to that of an officer looking for contraband in plain view." *Id.* at 39a-40a. "Overall," the court concluded, "the checkpoints * * * are targeted effectively and limited sufficiently to combat the city's drug crisis with minimal intrusion on motorists." *Id.* at 40a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-24a. Writing for the majority, Judge Posner began by noting that "[t]he legality of drug roadblocks has divided the other courts that have been asked to decide the issue." *Id.* at 2a (citing conflicting federal and state case law). Moreover, Judge Posner conceded that if "reasonableness is to be assessed at the level of the entire program," rather that at the level "of the individual stop," then "these roadblocks probably are

legal, given the high 'hit' rate and the only modestly intrusive character of the stops." *Id.* at 3a.

Judge Posner believed, however, that an analysis focusing on the reasonableness of the roadblock program would be incorrect, because "courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement." Pet. App. 4a. Because the City's program was aimed at law enforcement and was "meant to intercept a completely random sample of drivers," and because "there is neither probable cause nor articulable suspicion to stop *any* given driver," the program was unconstitutional—at least absent some "urgent considerations of public safety," such as having reason to believe that "a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis." *Id.* at 6a. The City's failure to establish "such urgency," Judge Posner concluded, required the City to comply "with the normal principles constraining law enforcement." *Ibid.*

Judge Posner acknowledged that this Court has upheld "roadblocks at which drivers are checked for being under the influence of alcohol or (other) mind-altering drugs," Pet. App. 7a, citing *Sitz*, "and roadblocks designed to intercept illegal immigrants," *ibid.*, citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). He concluded, however, that sobriety checkpoints are permissible because they are not concerned "primarily with catching crooks," but are instead "designed to protect other users of the road from the dangers posed by drunk drivers." Pet. App. 8a. Roadblocks to intercept illegal immigrants are sui generis, Judge Posner believed, because they "depend ultimately on

sovereign powers over foreign relations, foreign commerce, citizenship, and immigration." *Id.* at 9a.

Finally, Judge Posner also acknowledged that the City's program "often discover[s] violations of the traffic laws," and that stopping motorists would be constitutional "[i]f the purpose of the roadblock program were to discover such violations." Pet. App. 10a. But he concluded that the City's roadblock program cannot be upheld on that basis, because "purpose * * * is critical to * * * legality," and the City's use of a narcotics dog as part of the program "shows—what is anyway not contested—that the purpose of the roadblocks is to catch drug offenders." *Id.* at 10a-11a. Judge Posner suggested that the situation might well be different "if the primary purpose were to detect drunken drivers," because in that case "the dog could be added to the roadblock * * * on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible." *Id.* at 11a. He also left open whether the City's roadblock program might be upheld "on a fuller record," on a showing that the narcotics problems facing Indianapolis are on a par with Judge Posner's hypothetical "dynamite terrorist." *Id.* at 12a-13a.

Judge Easterbrook dissented. Pet. App. 13a-23a. Judge Easterbrook first rejected the majority's view that this Court's cases permit a roadblock program only where the roadblocks are not intended to enforce the criminal laws, noting that "*Martinez-Fuerte* approved a roadblock to search for alien smuggling, a violation of a criminal law," and that "*Sitz* approved a roadblock to search for drunk driving, a violation of a criminal law." *Id.* at 13a. Judge Easterbrook also rejected the majority's focus "on the 'primary' or 'real' motive for the

roadblock," explaining that this Court has repeatedly held that the inquiry under the Fourth Amendment is "objective." *Id.* at 13a-14a. Thus, "[s]o far as the fourth amendment is concerned, there is no difference between a roadblock originally designed to catch drug peddlers and also used to catch drunk drivers, and a roadblock originally designed to catch drunk drivers and also used to catch drug peddlers." *Id.* at 15a-16a.

Judge Easterbrook also noted that neither *Sitz* nor *Martinez-Fuerte* used the majority's analytical approach, but that instead both cases balanced the "slight" intrusion resulting from a roadblock against the success of the roadblock—so long as the officers' discretion is adequately constrained by objective guidelines. Pet. App. 18a-20a. Here, he noted, "Indianapolis was at pains to establish a rigorous protocol for its stops. Roadblocks are fixed; the number of cars selected for inspection is fixed; the procedure following a stop is fixed." *Id.* at 20a. Finally, he rejected the majority's characterization of *Martinez-Fuerte* as a case exemplifying "a 'border exception' or 'immigration exception' to normal fourth amendment principles * * *." *Id.* at 21a. He noted that "[t]he checkpoints [in that case] were between 65 and 90 miles inland," that the Court balanced the interests involved without suggesting "that enforcement of this body of laws should be especially easy," and that "[e]verything the Court wrote about the checkpoints in *Martinez-Fuerte* can be said about the roadblocks in Indianapolis." *Id.* at 20a-21a.

4. The City sought rehearing and suggested the appropriateness of rehearing the case en banc. The petition was denied, but Judge Easterbrook issued the following statement (Pet. App. 50a, n. *):

> The question presented by this case is an important and recurring one, but I have not called for a vote on the petition for rehearing en banc. The court's opinion shows that a conflict among the circuits (and state courts) preexisted the panel's opinion, and it would be pointless to sit en banc just to consider moving from one side of that conflict to another. Only a higher court can give a definitive answer.

REASONS FOR GRANTING THE WRIT

I. The Federal Courts Of Appeals And State Courts Of Last Resort Are Divided Regarding The Constitutionality Of The Fixed Checkpoints At Issue Here

As every judge who participated in the decision below recognized, the lower courts are deeply divided over the constitutionality of roadblocks used to detect narcotics use and trafficking. Indeed, in *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995), the Eleventh Circuit upheld a Florida program that is legally indistinguishable from that adopted by the City of Indianapolis, and did so precisely on the reasoning rejected by the Seventh Circuit in this case.

In *Merrett,* Florida law enforcement officials adopted a roadblock program that concededly was intended to intercept narcotics traffickers. As here, the checkpoints were clearly marked with traffic control devices (such as traffic cones or flashing lights) and warning signs. 58 F.3d at 1549. As here, officers stopped passing traffic, checked for safety defects, and examined each driver's license and registration. *Ibid.* As here, stopped vehicles were sniffed by a narcotics dog while the driver's

documentation was being checked, and "most people experienced only a slight delay" in the process. *Ibid.*

The Eleventh Circuit rejected the claims of unconstitutionality advanced by a class of motorists subjected to the stops, including the claim that "the operation was an invalid pretextual seizure" because "Florida conducted the roadblock operation at issue for the purpose of exposing the cars to the drug sniffing dogs." *Id.* at 1550. The court explained:

> That the chief (but not the sole) purpose of the roadblocks in this case was to intercept drugs is undisputed. That the state had the authority to conduct roadblocks to check drivers' license[s] and vehicle registration[s] is also undisputed. We conclude that, where the state has one lawful purpose sufficient to justify a roadblock, that the state also uses the roadblock to intercept illegal drugs does *not* render the roadblock unconstitutional.

Id. at 1550-51. Unlike the Seventh Circuit in this case, the Eleventh Circuit "adopt[ed] a totally objective rule: a state may conduct a mixed-motive roadblock as long as one purpose presented for the roadblock could validly justify the roadblock, *even if no roadblock would have been put in place but for the state's desire to hunt for unlawful drugs*." *Id.* at 1551 (emphasis added);[1] *see*

[1] Given that the license and registration roadblocks themselves were constitutional, the Eleventh Circuit rejected the proposition that the use of a narcotics dog "without an individualized reasonable suspicion of drug-related criminal activity amounted to an unconstitutional search." 58 F.3d at 1553. The court explained that a canine sniff is not a Fourth Amendment search, *ibid.*, citing *United States v. Place*, 462 U.S. 696 (1983), and that "[s]o long as

also United States v. Holloman, 113 F.3d 192, 195 (11th Cir. 1997) (reaffirming circuit rule that if "the * * * detention stemmed from a roadblock, the pretextual nature of the interdiction operation would not have offended the Fourth Amendment").

The Seventh Circuit's ruling also conflicts with the decision of the Supreme Court of North Dakota in *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), where that court upheld a roadblock in which officers checked stopped vehicles for safety violations, even though it was conceded that "the primary purpose of the checkpoint was to look for controlled substances." *Id.* at 700. As the Supreme Court of North Dakota saw it, consideration of the alleged "true" interest behind the roadblock did not invalidate the roadblock as "pretextual" but instead *strengthened* the case for its legality, by giving the State *two* important interests to balance against "the interference with individual liberty caused by the checkpoint." *Id.* at 700-01. Because the State unquestionably had "a vital interest in eradicating the problem of narcotics trafficking," and also "in ensuring that vehicles on its roads are safe for operation, and that licensing requirements are being observed" (*id.* at 701), and given the "minimal" intrusion on individual liberty occasioned by the roadblock (*id.* at 702), the court had no difficulty concluding that the "checkpoint did not violate the Fourth Amendment." *Id.* at 703.

[Footnote continued from previous page]

the use of the dogs did not make the delay caused by the roadblocks unreasonable * * * the state's decision to use dogs at the roadblocks does not make the operation unconstitutional." *Ibid.*

Finally, as the Seventh Circuit also conceded (Pet. App. 2a), the decision below conflicts with the ruling of the Supreme Court of Missouri in *State v. Damask*, 936 S.W.2d 565 (Mo. 1996). In *Damask*, officers conducting the roadblocks checked drivers' licenses and vehicle registrations (*id.* at 568), and also attempted to identify drug traffickers who might be using the roads (*ibid.*). Applying the *Brown v. Texas* balancing test (*id.* at 571 & nn. 14-15), the court upheld the checkpoints against a Fourth Amendment challenge (as did the district court in this case) by relying *solely* on the State's interest "in interdicting drug trafficking"—an interest that the court noted was "beyond serious dispute." *Id.* at 571. Indeed, the court rejected precisely the argument accepted by the Seventh Circuit in this case—*i.e.*, that a checkpoint must "promote a government interest separate from that of general law enforcement"—explaining that such a view cannot be squared with *Martinez-Fuerte*, which upheld a checkpoint designed to interdict illegal aliens. *Martinez-Fuerte*, the court believed, strongly supported the constitutionality of the checkpoint, because "[t]he flow of illegal drugs presents a law enforcement problem easily as important as that posed by the passage of illegal aliens into this country." 936 S.W.2d at 572.

Other federal and state courts, by contrast, have reached conclusions in line with the analysis adopted by the Seventh Circuit in this case. Although the Tenth Circuit ordinarily holds that "a brief stop at a highway roadblock for the limited purpose of verifying a driver's license, registration, and proof of insurance is a reasonable intrusion into the lives of drivers and their passengers even in the absence of reasonable suspicion,"

United States v. Galindo-Gonzales, 142 F.3d 1217, 1221 (10th Cir. 1998), that court, like the Seventh Circuit, attaches controlling significance to "whether the primary reason for the roadblock [is] to check the driver's license or to check the vehicle for drugs." *United States v. Morales-Zamora*, 974 F.2d 149, 152 (10th Cir. 1992). If the "primary reason" turns out to be the latter, as the Tenth Circuit held in suppressing a large quantity of narcotics seized during a roadblock, "it follows that the stop [is] pretextual and all that occurred thereafter [is] tainted." *Id.* at 153; *see also United States v. McFayden*, 865 F.2d 1306, 1312 (D.C. Cir. 1989) (suggesting that otherwise lawful roadblock may be held invalid if it is "a subterfuge").

The Sixth Circuit has expressly agreed with the Tenth Circuit's analysis on this point, *United States v. Huguenin*, 154 F.3d 547, 554-55 (6th Cir. 1998), and has equally clearly rejected the contrary views of the Eleventh Circuit. *Id.* at 553 ("Although the Eleventh Circuit in *Merrett* held that mixed-motive checkpoints are lawful as long as at least one of the underlying purposes * * * is legitimate, * * * we do not agree with its reasoning"); *see id.* at 563 (Kennedy, J., dissenting) ("I agree with the Eleventh Circuit * * *.").[2] The same

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[2] In *United States v. Ramirez-Gonzalez*, 87 F.3d 712 (5th Cir. 1996), the Fifth Circuit considered the validity of stopping motorists for what was labeled a "drug interdiction checkpoint." The defendant, who was arrested at the checkpoint because he was smuggling illegal aliens, contended that the sole purpose of the checkpoint had been to interdict drugs, and that such a purpose made the checkpoint unreasonable under the Fourth Amendment. The government contended that the checkpoint had been based instead "on general crime prevention concerns." *Id.* at 715-16.

or similar reasoning—invalidating roadblocks because of their purportedly pretextual nature—is found in the decisions of several State courts and local courts. *See, e.g.*, *Galberth v. United States*, 590 A.2d 990, 997 (D.C. 1991) ("it is clear that the police may not use a roadblock in order to seek evidence of drug-related crimes"); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. App. 1990); *LaFontaine v. State*, 497 S.E.2d 367, 369 (Ga. 1998).

That division of authority warrants this Court's review. The lower federal and state courts have by now fully considered the implications of all arguably pertinent decisions of this Court, and have nonetheless failed to reach accord on this important issue. In fact, the Seventh Circuit's decision in this case deepens even more that division of authority among the lower courts, which now seems certain never to abate absent this Court's intervention. This Court's review is, therefore, urgently needed to restore uniformity to this important area of federal law.

[Footnote continued from previous page]

The Fifth Circuit agreed with the defendant that a determination of "the primary purpose of" the checkpoints was essential to the constitutional analysis, and it remanded for an evidentiary hearing to establish that "primary purpose." *Id.* at 716. That inquiry would, of course, be wholly unnecessary if the Fifth Circuit agreed with the Eleventh Circuit's view that, because it is sufficient for a roadblock's legality that the detention be supported by *any* lawful aim, a court need not even consider whether a "pure" narcotics roadblock comports with the Fourth Amendment. Nor, of course, would that inquiry be necessary if the Fifth Circuit agreed with the Supreme Court of Missouri that a "pure" narcotics roadblock is in any event constitutional.

II. The Decision Below Is Inconsistent With This Court's Fourth Amendment Precedents

The Seventh Circuit's conclusion that this Court's cases foreclose a roadblock intended to enforce criminal laws, and that this Court instead invariably has required a "'special need' based on 'concerns *other than crime detection*,'" Pet. App. 5a (emphasis in original; citations omitted), before dispensing with a requirement of individualized suspicion was squarely rejected by this Court in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). *Sitz* made clear that no such "special needs" must be shown in "cases dealing with police stops of motorists on public highways." *Id.* at 450.

To the contrary, this Court has repeatedly applied a balancing test to assess the validity under the Fourth Amendment of checkpoint stops, and has repeatedly suggested that routine license-and-registration checkpoints are valid under that approach. Because this Court also has emphasized time and again that Fourth Amendment requirements are purely objective, the Eleventh Circuit correctly determined in *Merrett* that roadside checkpoints are lawful if conducted pursuant to a neutral program that directs officers to check motorists' licenses and vehicle registrations, even if those checkpoints would not, in fact, be conducted absent the desire to seek out drug offenders. For that reason alone, the Seventh Circuit's decision must be reversed. Moreover, even if it were necessary to consider in the analysis the City's "purpose" in ferreting out narcotics offenders, that additional interest would strengthen the case for the legality of the checkpoints.

1. It is common ground that a stop that occurs at a roadblock conducted pursuant to Indianapolis' program

is a "seizure" within the meaning of the Fourth Amendment. The Fourth Amendment, however, "does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989). In determining the "reasonableness" of a seizure, courts must balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas,* 443 U.S. 47, 50-51 (1979); *see also Maryland v. Wilson*, 519 U.S. 408, 411-12 (1997); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). A seizure satisfies that balance of interests if it is "based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual *or* [if it is] carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. at 51 (citations omitted) (emphasis added).

2. This Court has repeatedly applied those principles to uphold a variety of fixed automobile roadblocks on public roads. Thus, in *Martinez-Fuerte, supra*, the Court upheld the stopping of motor vehicles at two fixed checkpoints located, respectively, on highways that were 66 and 90 miles north of the Mexican border. *Martinez-Fuerte*, 428 U.S. at 545, 549. On one side of the balance, the Court found that the checkpoints—at which motorists were detained for brief questioning to determine whether illegal aliens were on board—served the "substantial[]" governmental interest in preventing the use of the highways by alien smugglers

and illegal aliens. *Id.* at 556-57. On the other side of the balance, the Court emphasized that an individual's "expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Martinez-Fuerte*, 428 U.S. at 561; *see also New York v. Class*, 475 U.S. 106, 112-14 (1986) (emphasizing pervasive regulation of automobiles and resulting diminished expectation of privacy enjoyed by motorists); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (same).

Indeed, *Martinez-Fuerte* noted that the "practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Martinez-Fuerte*, 428 U.S. at 560-61 n.14. Thus, in light of the "[t]he regularized manner in which established checkpoints [were] operated," which gave "visible evidence, reassuring to law-abiding motorists, that the stops [were] duly authorized and believed to serve the public interest," the Court had little difficulty in concluding that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by a warrant." *Id.* at 559, 566.

Three years after deciding *Martinez-Fuerte*, the Court struck down a police practice of *random* stops of vehicles to check drivers' documents in *Delaware v. Prouse*, 440 U.S. 648 (1979). The Court conceded that "[s]tates have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle

inspection requirements are being observed." *Prouse*, 440 U.S. at 658. The Court concluded, however, that Delaware's use of discretionary spot checks invaded significant privacy interests, because the State had granted "unbridled discretion [to] law enforcement officers." *Ibid.* Such discretionary random stops, the Court explained, were likely to produce fear and anxiety in the detained individual, and were therefore unlike the checkpoints at issue in *Martinez-Fuerte*: "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Prouse*, 440 U.S. 657 (quoting *Martinez-Fuerte*, 428 U.S. at 558).

The Court emphasized in *Prouse* that it did not mean to preclude "States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Prouse*, 440 U.S. at 663. In particular, the Court suggested that there would be no Fourth Amendment defect in a practice of "[q]uestioning * * * all oncoming traffic at roadblock-type stops." *Id.* at 663; *see also id.* at 664 (Blackmun, J., concurring) ("The roadblock stop for all traffic is given as an example. I necessarily assume that [it] includes other not purely random stops (such as every 10th car to pass a given point) * * *."). Indeed, the validity of routine fixed roadblocks was confirmed by *Texas v. Brown*, 460 U.S. 730 (1983), in which the defendant had been stopped at "a routine driver's license checkpoint" in the City of Fort Worth, Texas *Id.* at 733. The four-Justice plurality noted that the lower court, though granting relief to the defendant on the ground that the officer violated the Fourth Amendment *after* the

initial stop by seizing evidence not in "plain view," had not "question[ed] the validity of the officer's initial stop of [the] vehicle as part of a license check.'" *Id.* at 739. Citing *Prouse*, the plurality expressly "agree[d]" with that conclusion. *Ibid.* No Justice took issue with the plurality's characterization of the "license checkpoint" as a lawful traffic roadblock.[3]

Most recently, in *Sitz*, *supra*, the Court rejected a Fourth Amendment challenge to a sobriety checkpoint policy under which all vehicles arriving at a pre-determined location would be stopped and their drivers examined for signs of intoxication. 496 U.S. at 447. The Court emphasized "the magnitude of the drunken driving problem and the States' interest in eradicating it." *Id.* at 451. The Court also noted that "[c]onversely, the weight bearing on the other side of the scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight." *Ibid.* In fact, the Court could "see virtually no difference" in "the levels of intrusion on law-abiding motorists" caused by sobriety and alien-smuggling checkpoints, whether viewed in terms of the "objective" intrusion (measured by the duration of the seizure and the intensity of the investigation) or in terms of the "subjective" impact on law abiding motorists (measured by the potential for generating unwarranted fear and surprise). *Id.* at 451-53. In either case, the Court concluded, "the intrusion

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[3] In fact, the disposition for which each concurring Justice voted (*i.e.*, reversal of the judgment that had been rendered in the defendant's favor) necessarily assumed the correctness of the plurality's threshold determination that the initial seizure of the defendant at the "license roadblock" had been lawful.

resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops * * * upheld in *Martinez-Fuerte*." *Id.* at 453.

2. Taken together, *Martinez-Fuerte*, *Prouse*, *Texas v. Brown*, and *Sitz* leave no doubt that a program of checkpoints in which motorists are stopped and examined for signs of impairment while their driving documentation is checked by police officers is clearly constitutional, so long (as was the case with the City's program) as the individual officers' discretion is adequately constrained by neutral objective criteria. It is equally clear under this Court's cases that a canine sniff of a lawfully stopped car is not a "search" that is subject to independent Fourth Amendment inquiry. *United States v. Place*, 462 U.S. 696 (1983). Yet the Seventh Circuit added those two wholly permissible acts to produce a Fourth Amendment violation, because it ascribed to this Court a concern with the "primary purpose" of a stop that in the Seventh Circuit's view rendered the City's program impermissible. That reasoning is clearly erroneous.

This Court has consistently held that the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officer's state of mind at the time the challenged action was taken. *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). Based on that principle, the Court has repeatedly held that the government's motivation or intent is irrelevant in a variety of Fourth Amendment contexts. *See, e.g.*, *Whren*

v. United States, 517 U.S. 806, 813 (1996) (allegedly pretextual traffic stop); *Horton v. California*, 496 U.S. 128, 137-38 (1990) ("plain view" seizures); *Graham v. Connor*, 490 U.S. 386, 397-99 (1989) (amount of force needed to effect arrest); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3 (1983) (allegedly "pretextual" boarding of vessel). As this Court recently stated, "'the fact that [a police] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action so long as the circumstances, viewed objectively, justify that action.'" *Whren*, 517 U.S. at 813 (quoting *Scott*, 436 U.S. at 138).

The Seventh Circuit, however, believed that this Court had as much as held in *Texas v. Brown*, *supra*, that the Fourth Amendment "would be violated if 'the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in plain view in the course of a check for drivers' licenses.'" Pet. App. 7a, quoting *Texas v. Brown*, 460 U.S. at 743. But the passage of the plurality's opinion in *Texas v. Brown* on which the Seventh Circuit relied not only was dictum but also did not concern the lawfulness of the stop as such; the Court was addressing whether the requirements of the "plain view" doctrine had been established. At the time this Court decided *Texas v. Brown*, the Court had not yet discarded the view that the "plain view" doctrine required that evidence be found "inadvertently." Thus, the plurality's suggestion that the existence of a "pretext" might present a different case merely distinguished a situation in which that "inadvertence" requirement would not be met. Ironically, the Seventh Circuit failed to note that when this Court finally discarded the "in-

advertence" requirement in *Horton, supra,* it explained that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer."

Because the Seventh Circuit plainly misconstrued this Court's cases assessing the relevance of governmental "purpose" to the lawfulness of traffic stops, the court's ruling can be reversed on the limited ground adopted by the Eleventh Circuit in *Merrett*: that the City's program, objectively considered, is a permissible check of motorists' documentation and sobriety, and that, whatever the City's motivation in providing for a canine sniff of stopped vehicles, that sniff invades no separate Fourth Amendment interest.

3. In any event, consideration of the City's "purpose" in interdicting illegal drugs contributes to, rather than detracts from, the overall reasonableness of the City's program. As *Sitz* makes clear, motorists experience only a "slight" intrusion when they are stopped for a few minutes at a fixed highway checkpoint, and in fact there is "virtually no difference" from the motorists' point of view between a sobriety checkpoint and a checkpoint designed to ferret out smugglers. *Sitz*, 496 U.S. at 451-52. The other side of the scale, however, tips even more decidedly in the City's favor when its interest in interdicting narcotics smugglers is added to the balance.

The public interest in detecting the transportation of narcotics on the highways is compelling. Drug trafficking is "one of the greatest problems affecting the health and welfare of our population," *NTEU v. Von Raab*, 489 U.S. 656, 668 (1989), and it has caused a

"'veritable national crisis in law enforcement.'" *Ibid.*, quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). "[T]hrough the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs." *Von Raab*, 489 U.S. at 669. Indeed, the government's need for the aid provided by checkpoints is particularly compelling in the case of drug smuggling. Smuggling, whether of aliens or of narcotics, is a crime of stealth, requiring only concealment and escape for its successful completion. Thus, it is rarely practical to develop reasonable suspicion that any particular automobile is carrying contraband, "because the flow of traffic tends to be too heavy to allow the particularized study of a given car * * *." *Martinez-Fuerte*, 428 U.S. at 557. Yet, as demonstrated by the high "hit rate" produced by the City's program, there is ample reason to believe, as even the Seventh Circuit conceded, that narcotics smuggling on some of the City's roads "approaches epidemic proportions." Pet. App. 12a. The City's interest in eradicating that "epidemic" vastly exceeds any negligible additional inconvenience that motorists may suffer as a result of the City's decision to add a narcotics dog to a roadblock that otherwise is plainly lawful.

III. The Question Presented Is An Important And Recurring One, And Immediate Review Is Essential In Order To Provide Guidance to Law Enforcement And Avoid Wasteful Litigation

This case raises a question of substantial importance—and one that already has been exhaustively litigated in the lower courts—concerning the ability of

law enforcement officers to detect dangerous contraband on public highways. The Seventh Circuit's opinion not only invalidated a concededly effective roadblock program, but did so on the basis of reasoning that departs from the decisions of other lower courts and offers little guidance to policy-makers or law enforcement officers who may be called upon to craft effective alternatives. The Seventh Circuit's ruling also offers little help to the citizenry, who are left to wonder whether officers conducting seemingly routine highway checkpoints in fact possess the constitutional authority to stop motorists.

As the Seventh Circuit sees it, the answers to those questions depend on whatever "purpose" may later be found by a court to have dominated the individuals who devised the roadblock. If the dominant "purpose" is to enforce the criminal laws, the roadblock will almost certainly be found to violate the Fourth Amendment, unless the government can bring itself within a newly-minted Fourth Amendment "exception" of uncertain provenance or scope. That "exception," which the Seventh Circuit could describe no better than by example (the hypothetical "terrorist" driving toward downtown with a car full of dynamite, Pet. App. 6a, 12a), may be available when application of "the normal principles constraining law enforcement" would amount to carrying out a "suicide pact." *Id.* at 6a.[4] It is mani-

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[4] The Seventh Circuit stated that its ruling on the legality of the City's program was "necessarily tentative," because the district court decided the case "on a very skimpy stipulation of facts." Pet. App. 2a. The court did not explain, however, what additional "facts" that it believed relevant to the Fourth Amendment inquiry

fest that neither the government nor the citizenry profits from so impressionistic a doctrine. This Court's review is needed to restore to highway roadblocks the objective standards of conduct that, as experience has taught, best promote "evenhanded law enforcement." *Horton*, 496 U.S. at 138.

Immediate review of the important and recurring question presented by this case is particularly appropriate here, because the alternative is to leave in place a rule of law that not only will have a significant adverse effect on prosecutions stemming from the City's roadblocks, but also on criminal cases throughout the Seventh Circuit in which evidence has been seized as a result of roadblocks that now may be subject to challenge under the decision below. Moreover, because

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[Footnote continued from previous page]

were missing from the stipulated record, and accordingly provided no guidance for any subsequent factual development on remand. The court's reference to the absence of additional "facts" evidently was meant only to keep open the possibility that the City might attempt to show on remand that narcotics smuggling is sufficiently serious to meet the Seventh Circuit's ill defined "terrorist/suicide-pact" exception. *See id.* at 12a-13a. But the precise gravity of the drug epidemic or any other governmental justification for a checkpoint is a question of "legislative fact," which should be decided alike in all cases involving "narcotics checkpoints." It is not an issue of "adjudicatory fact," on which courts in different parts of the country should be permitted to reach conflicting conclusions solely because of the particular record concerning the seriousness of the problem that was assembled by individual litigants. *See generally* Kenneth Karst, *Legislative Facts in Constitutional Litigation* 1960 Sup. Ct. Rev. 75, 82-86. Indeed, this Court's cases *already* establish that the drug epidemic is a problem of the utmost gravity. *See, e.g., Von Raab*, 489 U.S. at 668.

the Seventh Circuit's decision now renders "narcotics roadblocks" almost always impermissible in states within that court's jurisdiction, public officials and police officers who henceforth may be found to have planned or executed such a roadblock may be held liable in damages for conduct that is perfectly lawful in other parts of the country. The threat of such liability will unduly deter the work of those upon whom the public depends for its safety. Review by this Court is warranted to restore predictability and rationality to the rules that guide those officers and the citizenry in what was, until the decision below, a routine interaction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

GARY DAMON SECREST
Counsel of Record
THOMAS E. SATROM
OFFICE OF CORPORATION COUNSEL
CONSOLIDATED CITY OF INDIANAPOLIS
200 E. Washington Street
Indianapolis, IN 46204
(317) 327-4055

Counsel for Petitioners

December 1999

APPENDIX

James EDMOND and Joell Palmer, on their own behalf and on behalf of a class of those similarly situated, Plaintiffs-Appellants,

v.

Stephen GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana; City of Indianapolis, Indiana; and Unknown Members of the Indianapolis Police Department, Defendants-Appellees.

No. 98-4124.
United States Court of Appeals,
Seventh Circuit.
Argued April 12, 1999.
Decided July 7, 1999.

Motorists brought class action against city, mayor, and members of police department, alleging that drug interdiction checkpoints violated Fourth Amendment. The United States District Court for the Southern District of Indiana, Sarah Evans Barker, Chief Judge, 38 F.Supp.2d 1016, denied motorists' motion for preliminary injunction. Motorists appealed. The Court of Appeals, Posner, Chief Judge, held that police roadblocks intended to catch drug offenders violated Fourth Amendment.

Reversed.

Easterbrook, Circuit Judge, dissented and filed opinion.

Kenneth J. Falk (argued), Indiana Civil Liberties Union, Indianapolis, IN, for Plaintiffs-Appellants.

Stephen Carter, Office of the Corporation Counsel, City Counsel Legal Division, Indianapolis, IN; Thomas E. Satrom

(argued), Office of Corporation Counsel, Indianapolis, IN, for Defendants-Appellees.

Before POSNER, Chief Judge, and EASTERBROOK and DIANE P. WOOD, Circuit Judges.

POSNER, Chief Judge.

A class action has been brought to enjoin the City of Indianapolis from setting up roadblocks to catch drug offenders, a practice that the plaintiffs claim violates the Fourth Amendment. The plaintiffs' motion for a preliminary injunction was denied on the ground that the City's practice is lawful, precipitating this interlocutory appeal under 28 U.S.C. § 1292(a)(1). The legality of drug roadblocks has divided the other courts that have been asked to decide the issue. Compare *United States v. Huguenin*, 154 F.3d 547, 554-55 (6th Cir.1998); *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir.1992); *Galberth v. United States*, 590 A.2d 990 (D.C.1991), and *Wilson v. Commonwealth*, 29 Va.App. 63, 509 S.E.2d 540 (1999), which held them illegal, with *Merrett v. Moore*, 58 F.3d 1547 (11th Cir.1995), and *State v. Damask*, 936 S.W.2d 565 (Mo.1996), which held them legal. This is our first case. Because it was decided by the district court on a very skimpy stipulation of facts, our ruling on the legality of the City's program is necessarily tentative.

Six times between August and November of last year, the City's police department set up roadblocks on Indianapolis streets to catch drug offenders. A total of 1,161 cars were stopped at these roadblocks--for how long is unclear but the police endeavor to operate the checkpoints in such a manner that the stop does not exceed five minutes. During the stop, the police demand the driver's license and car registration, peer through the car's windows into its interior, and lead a drug-sniffing dog around the car. The stopping of the 1,161

vehicles resulted in 55 drug-related arrests, meaning that 5 percent of the total number of stops resulted in successful drug "hits," and 49 arrests for conduct unrelated to drugs, such as driving with an expired driver's license, for an overall hit rate of 9 percent. The City is continuing the program.

Stopping a car at a roadblock is a seizure within the meaning of the Fourth Amendment, *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), even though the sequel--the peering into the car windows and the sniffing of the car by the dog outside--does not rise to the level of a search as that term of the amendment has been interpreted by the Supreme Court. *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *Texas v. Brown*, 460 U.S. 730, 739-40, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *United States v. Ware*, 914 F.2d 997, 1000 (7th Cir.1990); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788-89 (1st Cir.1991). Whether the seizures effected by Indianapolis's drug roadblocks are reasonable may depend on whether reasonableness is to be assessed at the level of the entire program or of the individual stop. If the former, these roadblocks probably are legal, given the high "hit" rate and the only modestly intrusive character of the stops. In many Fourth Amendment contexts, the reasonableness of a practice is held to depend on the balance between its benefits (usually nonpecuniary) and its costs (ditto). E.g., *Wyoming v. Houghton*, --- U.S. ----, ----, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408 (1999); *Whren v. United States, supra*, 517 U.S. at 817, 116 S.Ct. 1769; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *Dimeo v. Griffin*, 943 F.2d 679, 681 (7th Cir.1991) (en banc). The benefits of a random system of searches or seizures, such as vehicle stops pursuant to a roadblock system, are a function of, first, the

probability that the stop will result in an arrest or a seizure of contraband or evidence of crime, and, second, the gain to the achievement of a lawful governmental goal that such an arrest or seizure will produce. The costs are a function of the harm that the stop will cause to the property or privacy of the people whose cars are stopped. In the case of Indianapolis's drug-roadblock program, the probability of a "hit" is high (vastly higher than, for example, the probability of a hit as a result of the screening of embarking passengers and their luggage at airports, see *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n. 3, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)), and the deterrence of drug offenses produced by these hits advances the strong national, state, and local policy of discouraging the illegal use of controlled substances. The cost--in delay, anxiety, and invasion of privacy--to the drivers and passengers stopped for five minutes at a roadblock and subjected to a visual inspection of the interior and a sniff by a dog is small, though it is greater than the cost of the normal airport screening and (like that screening) is incurred in all stops while the benefit from the program is obtained only when there is a hit.

But courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement, see, e.g., *Whren v. United States, supra*, 517 U.S. at 810, 116 S.Ct. 1769, rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders. E.g., *Michigan v. Tyler*, 436 U.S. 499, 504-06, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *Camara v. Municipal Court, supra*; *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574 (7th Cir.1999). Because it is infeasible to quantify the benefits and costs of most law enforcement programs, the program approach might well permit deep inroads into privacy. In high-crime areas of America's cities it might justify methods of policing that are

associated with totalitarian nations. Cf. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). One can imagine an argument that it would be reasonable in a drug-infested neighborhood to administer drug tests randomly to drivers and pedestrians. Although there is nothing in the text of the Fourth Amendment to prevent dragnet searches (read literally, the text requires only that searches and seizures be "reasonable" and confines the requirement of "probable cause" to searches or seizures made pursuant to warrant), the Supreme Court has insisted that "to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing," save in cases of "special need" based on "concerns *other than crime detection*." *Chandler v. Miller*, 520 U.S. 305, 313-14, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (emphasis added); see also *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560-61, 96 S.Ct. 3074; *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Program-level justifications for searches in support of specific regulatory programs do not carry over to general criminal law enforcement. See, e.g., *Chandler v. Miller*, *supra*, 520 U.S. at 313-14, 117 S.Ct. 1295; *New York v. Burger*, 482 U.S. 691, 716 n. 27, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Michigan v. Tyler*, *supra*, 436 U.S. at 508, 98 S.Ct. 1942; *Donovan v. Dewey*, 452 U.S. 594, 598 n. 6, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *Abel v. United States*, 362 U.S. 217, 226, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (plurality opinion); *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir.1989).

The qualification in "ordinarily" must not be overlooked. When the police establish a roadblock on a route that they know or strongly suspect is being used by a dangerous criminal to escape, the probability is high not only of

apprehending the criminal but also of preventing him from engaging in further criminal, or otherwise hazardous, activity incidental to his escape. See, e.g., *United States v. Harper*, 617 F.2d 35, 40-41 (4th Cir.1980). So the roadblock is allowed even though it is likely to "seize" some individuals who are not suspected of wrongdoing.

But here the roadblock is meant to intercept a completely random sample of drivers; there is neither probable cause nor articulable suspicion to stop *any* given driver. Even so, we can imagine cases in which, although the police do not suspect anyone, a roadblock or other dragnet method of criminal law enforcement would be reasonable. We may assume that if the Indianapolis police had a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis, they would not be violating the Constitution if they blocked all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity. See *Maxwell v. City of New York*, 102 F.3d 664 (2d Cir.1996); *Norwood v. Bain*, 143 F.3d 843, 845-50 (4th Cir.1998), *aff'd.* (so far as pertinent), 166 F.3d 243, 245 (4th Cir.1999) (en banc) (per curiam); *United States v. Williams*, 372 F.Supp. 65 (D.S.D.1974); *Brinegar v. United States*, 338 U.S. 160, 183, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (Jackson, J., dissenting); 4 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a) (3d ed.1996); American Law Institute, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(2) (1975). When urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact. But no such urgency has been shown here.

The Supreme Court has upheld the validity of roadblocks in less extreme cases, however, and it is on these that the City

pitches its defense of its program. The Court upheld sobriety checkpoints--roadblocks at which drivers are checked for being under the influence of alcohol or (other) mind-altering drugs--in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and roadblocks designed to intercept illegal immigrants, in *United States v. Martinez-Fuerte, supra*. The Court has not, however, ever held or stated that *all* roadblock programs (even those not vulnerable to a charge of delegating too much discretion to individual police officers) are consistent with the Fourth Amendment. On the contrary, the amendment would be violated if "the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." *Texas v. Brown, supra*, 460 U.S. at 743, 103 S.Ct. 1535 (plurality opinion); *see also United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975).

Randomized search programs have been upheld that involved the compelled provision of urine samples for drug testing of law enforcement officers, jockeys, railroad workers, and other classes of employee, e.g., *Vernonia School District 47J v. Acton, supra*; *National Treasury Employees Union v. Von Raab, supra*, 489 U.S. at 665-66, 109 S.Ct. 1384; *Skinner v. Railway Labor Executives' Ass'n, supra*; *Dimeo v. Griffin, supra*, as well as administrative searches conducted without any basis to suspect any particular individual of wrongdoing, but rather pursuant to a program of inspections incidental to a general scheme of licensing or other regulation. E.g., *New York v. Burger, supra*; *Michigan v. Tyler, supra*; *Camara v. Municipal Court, supra*; *In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127 (7th Cir.1988). But again the Court has not granted carte blanche.

Many of the cases we have cited do involve criminal prosecutions, however, and we must consider how they can

be squared with the principle that the requirement of individualized suspicion is to be relaxed only on the basis of (as the Supreme Court said in the *Chandler* case, an example of a systematic search program that did not pass constitutional muster) "concerns *other than* crime detection." The answer is that the concern which lies behind the randomized or comprehensive systems of inspections or searches that have survived challenge under the Fourth Amendment is not primarily with catching crooks, but rather with securing the safety or efficiency of the activity in which the people who are searched are engaged. Consider employment drug tests for transport workers, as in the *Skinner* case. The employee who uses drugs will perform badly in his work, to the detriment of fellow employees or the general public; and the most effective preventive measure may be to test all or a random selection of applicants or employees. Similar are sobriety checkpoints, which are designed to protect other users of the road from the dangers posed by drunk drivers; administrative searches that are ancillary to concededly lawful systems of inspection; and the use of metal detectors and x-ray machines to screen entrants to government buildings and embarking air travelers. *United States v. Herzbrun*, 723 F.2d 773, 775-76 (11th Cir.1984); *United States v. Edwards*, 498 F.2d 496 (2d Cir.1974) (Friendly, J.); *United States v. Davis*, 482 F.2d 893, 908-10 (9th Cir.1973). These cases rest on the commonsense principle that employers and other proprietors (such as the state as the owner of public roads), including the quasi-proprietor that is the government in heavily regulated industries, *see, e.g., United States v. Biswell*, 406 U.S. 311, 316-17, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), have a right to take reasonable measures to protect the safety and efficiency of their operations. These measures, moreover, usually make only limited inroads into privacy, because a person can avoid being searched or seized by avoiding the regulated activity, though we hesitate to put much weight on this point; people

are unlikely to feel they can afford to "ground" themselves in order to avoid airport searches.

Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime. Imagine if the government set up a metal detector outside each person's home and required the person to step through it whenever he entered or left, in order to determine whether he was carrying a gun for which he lacked a permit. A principle that justified a drug roadblock would justify such surveillance.

We mentioned cases that allow the police or the Border Patrol to set up roadblocks to intercept illegal immigrants, a form of "contraband" to which illegal drugs might be analogized. Other cases allow custom searches of the luggage of people entering the United States. For examples of both types of case, see *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985); *United States v. Martinez-Fuerte*, *supra*; *United States v. Ramsey*, 431 U.S. 606, 616-19, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); *United States v. Johnson*, 991 F.2d 1287, 1290-92 (7th Cir.1993). But such cases depend ultimately on sovereign powers over foreign relations, foreign commerce, citizenship, and immigration (see, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-89, 72 S.Ct. 512, 96 L.Ed. 586 (1952) (Jackson, J.)) that states and cities do not possess. *Martinez-Fuerte* involved searches well inland from the border, but the Court emphasized the infeasibility of preventing illegal immigration by border checks alone. 428 U.S. at 552, 96 S.Ct. 3074.

We are mindful of the paradoxical implication that the Fourth Amendment, though originally limited to federal law enforcement, may pinch the states more tightly. But the

paradox need not detain us. Indianapolis makes no attempt to defend its roadblocks on the basis that it is trying to exclude a harmful substance or dangerous persons. Though that may be the ultimate aim, the City concedes that its proximate goal is to catch drug offenders in the hope of incapacitating them, and deterring others, by criminal prosecution. The program has no regulatory purpose that might be compared to that of the immigration laws, which seek to exclude and deport illegal immigrants rather than just to prosecute them for criminal violations of the immigration laws.

It is true that in the course of looking for drugs in vehicles stopped at its drug roadblocks, the Indianapolis police often discover violations of the traffic laws. If the purpose of the roadblock program were to discover such violations, and if a program having such a purpose could be justified under the cases that allow searches and seizures without individualized suspicion of wrongdoing, then the seizure, in the course of such searches, of drugs that were in plain view would be lawful. *Texas v. Brown, supra*; *United States v. Trevino*, 60 F.3d 333, 336 (7th Cir.1995). But the first "if" has not been shown. It is necessary in this regard to distinguish between two kinds of purpose, that of the program's designers and that of the police officers manning the roadblocks. The test for the lawfulness of a particular search or seizure is an objective one; the motives of the officer carrying out the search or seizure are irrelevant. *Whren v. United States, supra*, 517 U.S. at 811-13, 116 S.Ct. 1769; *United States v. VillamonteMarquez*, 462 U.S. 579, 584 n. 3, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983); *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978); cf. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). But the purpose behind the *program* is critical to its legality. The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals. *New*

York v. Burger, supra, 482 U.S. at 716 n. 27, 107 S.Ct. 2636. "[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes." *Whren v. United States, supra*, 517 U.S. at 811-12, 116 S.Ct. 1769 (emphasis in original); *see also Texas v. Brown, supra*, 460 U.S. at 743, 103 S.Ct. 1535 (plurality opinion). Leading a drug-sniffing dog around a car cannot be justified by reference to a desire to detect traffic violations, and so the use of the dog at the City's roadblocks shows--what is anyway not contested--that the purpose of the roadblocks is to catch drug offenders. We are not asked to decide whether, if the primary purpose were to detect drunken drivers, the dog could be added to the roadblock scenario on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible, or at least would not violate the Fourth Amendment.

It can be objected that requiring consideration of purpose injects too large an element of uncertainty into the interpretation of the amendment, and that purpose may be difficult to determine when it is corporate in nature. But law like politics is the art of the possible and often requires imperfect compromises. Inquiry into purpose is one method of identifying and banning the most flagrantly abusive governmental conduct without handcuffing government altogether. The alternative would be to rule that either all roadblocks are illegal or none are, which would be akin to punishing all killings identically because the "objective" fact is that someone has died.

To summarize, we have identified four exceptions to the principle that a search or seizure is forbidden by the Fourth Amendment unless there is a basis for believing that a particular search or seizure, as distinct from a program of universal or randomized searches or seizures, will yield

evidence or fruits or instrumentalities of crime. The first exception, illustrated by the roadblock set up to catch a fleeing criminal, is where there is a suspect--the police have identified the criminal and have only to find him--but it is infeasible to avoid an indiscriminate search or seizure of other persons, persons not suspected of crime, as well. The second exception, illustrated by the hypothetical dynamite case, is where no specific person is under suspicion but the circumstances make it impossible to prevent a crime without an indiscriminate search. The third exception is the regulatory search, the objective of which is to protect a specific activity rather than to operate as an adjunct to general criminal law enforcement. The last exception is the prevention of illegal importation whether of persons (a power limited to the federal government, *Saenz v. Roe*, --- U.S. ----, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999)) or of goods. On the basis of the record compiled in the preliminary-injunction proceedings--a record essentially limited to the parties' stipulation of facts--the Indianapolis roadblock program has not been shown to fit any of these exceptions, and thus the lawfulness of the program has not, as the district judge believed, been established. As that was the only ground on which she denied the preliminary injunction, her order cannot stand.

Whether there may be other grounds for denying the preliminary injunction, or whether on a fuller record the Indianapolis program might pass Fourth Amendment muster, are issues for the district court to decide in the first instance. We are not enthusiastic about the use of the Constitution to squelch experiments in dealing with serious social problems. The high hit rate of Indianapolis's roadblock scheme suggests that Indianapolis has placed the roadblocks in areas of the city in which drug use approaches epidemic proportions; and if so the roadblocks might be justified by reference to the second exception, as illustrated by such cases as *Maxwell* (involving a flurry of drive-by shootings), *Norwood* (threat of

violence at a rally of motorcycle gangs), and *Williams* (Indian insurrection). But this is not argued either. REVERSED.

EASTERBROOK, Circuit Judge, dissenting.

Roadblocks in Indianapolis check for both driving and drug offenses. Someone driving a car without a license, or with drugs, can expect arrest. The program is spectacularly successful as roadblocks go; 9.4% of those stopped are arrested, with the reason equally divided between driving and drug crimes. Roadblocks with much lower rates of success have been held consistent with the fourth amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (0.12% success rate); *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (1.6% success rate). Yet my colleagues declare that the fourth amendment forbids what Indianapolis has done, because its primary purpose is to enforce the criminal laws. *Martinez-Fuerte* approved a roadblock to search for alien smuggling, a violation of a criminal law; *Sitz* approved a roadblock to search for drunk driving, a violation of a criminal law. So how can the fact that possessing drugs violates the criminal laws doom this program? One would suppose that our case is a *fortiori* from *Sitz*, because alcohol, marijuana, and cocaine all are drugs, any of which can impair a driver's performance. If the Constitution allows a roadblock to intercept alcohol users, how can it condemn a roadblock to intercept marijuana and cocaine users?

My colleagues' answer is that everything depends on the "primary" or "real" motive for the roadblock. Thus if Indianapolis set out to find people driving without licenses and only later added a dog to sniff for drugs (a step that does not entail a search or seizure of any kind, see *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983))

in cars that already were stopped, then the program would pass constitutional muster. But if the City first decides to search for drugs, then adds license checks to make better use of the time while the dog does its work, then the program is invalid. If a city starts a license + drug program, then its validity depends on the primary motivation: if to search for people not legally entitled to drive, the program is valid; if to search for people not legally entitled to carry drugs, invalid. If a program is designed primarily to search for people *using* drugs in the car, and only secondarily to locate drugs in the trunk, then it is valid; if it is designed primarily to search for carried drugs, and only secondarily for ingested drugs, then it is invalid.

Why should the constitutionality of a roadblock program turn on what its promoters think (or the order in which its components were approved), rather than on what happens to the citizenry? Over and over, the Supreme Court says that the reasonableness inquiry under the fourth amendment is objective; it depends on what the police do, not on what they want or think. *Whren v. United States*, 517 U.S. 806, 811-13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985); *Scott v. United States*, 436 U.S. 128, 136-38, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). The majority believes that things are otherwise when a program's design is in issue: "the purpose behind the *program* is critical to its legality. The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." 183 F.3d at 665 (emphasis in original). Where does "purpose" come into the fourth amendment? Not from its text; reasonableness fairly screams an objective inquiry. Not from its history; my colleagues do not mention the amendment's genesis. Not from the Supreme Court's cases. None of the opinions my colleagues cites requires a tour through the heads of the

programs' sponsors. None suggests that the Constitution blesses a program in which a criminal-investigation component is added to a regulatory-enforcement one, while condemning an identical program in which the criminal-investigation component comes first. When the Supreme Court speaks of "regulatory" programs, such as the searches of business premises in *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), or *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), it asks what the programs *do*, not what the sponsors of the programs *had in mind*. So far as the fourth amendment is concerned, there is no difference between a roadblock originally designed to catch drug peddlers and also used to catch drunk drivers, and a roadblock originally designed to catch drunk drivers and also used to catch drug peddlers. Only observable differences in police behavior enter into the calculus of "reasonableness."

To be consistent, therefore, my colleagues should say that the fourth amendment would not permit the Michigan Department of State Police to add a drug-detection dog to the roadblock program sustained in *Sitz*. That conclusion would be so jarring, given received doctrine that a dog's sense of smell is not a search and requires no justification, that it could not be sustained. Yet if a dog may be added to the program sustained in *Sitz*, it can't matter to "reasonableness" whether some of the program's sponsors thought the dog more important than the breathalyzer. The trial envisaged by my colleagues--one at which officials of Indianapolis will testify about their motivations in approving the roadblock program, and the district judge must make credibility findings to resolve the fourth amendment objection--has no relation to the objective standard that a "reasonableness" benchmark demands.

What has led the majority to its search for the "primary purpose" behind a program, and thus to the startling

conclusion that a given program may be constitutional or not today depending on what the Mayor thought last year, is its belief that "[p]rogram-level justifications for searches . . . do not carry over to general criminal law enforcement." 183 F.3d at 662. Indianapolis has adopted a program that is objectively reasonable given its minimal intrusion and substantial success (183 F.3d at 661), but my colleagues say that only "regulatory" programs may be justified in this manner. Without a distinction between criminal and regulatory searches, it would be impossible to understand *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), which holds that a warrant may be issued without probable cause, despite the text of the fourth amendment, provided the government really isn't looking for anything in particular. But none of the Supreme Court's cases equates "regulatory search" with "regulatory *purpose*"; the Court's line is objective, while my colleagues' is subjective.

For every statement suggesting that criminal law enforcement may not be justified at the program level, it is easy to find another to the contrary-- often in the same opinion. For example, my colleagues quote a few words from *Chandler v. Miller*, 520 U.S. 305, 313-14, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). That very opinion contains this passage (*id.* at 308, 117 S.Ct. 1295): "Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in 'certain limited circumstances.' *See Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-550, 566-567, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), or at a sobriety checkpoint, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and administrative inspections in 'closely regulated' businesses,

New York v. Burger, 482 U.S. 691, 703-704, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987)." This treats the roadblock and regulatory cases as independent, undermining the proposition that roadblocks are improper when they seek evidence of crime. Consider what *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), had to say: "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." (Emphasis added.) Lots of avowedly criminal searches are justified at a program level. After making a custodial arrest, the police may conduct a complete search of the person, including the contents of any packages he may be carrying. *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). After entering a dwelling to make an arrest, police may conduct a visual "protective sweep" of other rooms to ensure that armed occupants there do not pose a risk. *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). The list of searches and seizures justified in the aggregate, without regard to person-specific cause, is quite long. Roadblocks are just another example. See Wayne R. LaFave, 4 SEARCH AND SEIZURE §§ 9.4(j), 9.6(b) (3d ed.1996).

Interpretation of the fourth amendment is not a model of intellectual consistency. See Akhil Reed Amar, FOURTH AMENDMENT FIRST PRINCIPLES, 107 Harv. L.Rev. 757, 757-61 (1994). Cases create oodles of cubbyholes. My colleagues want to take as a fundamental doctrine that criminal investigations require person-specific cause, and conform all fourth amendment law to it. I suppose one could go in a different direction and treat auto searches or housing inspections as the paradigm. But our job as an inferior court is not to pick favorite passages from the hundreds of fourth amendment opinions the Supreme Court has issued, but to

apply the principles devised for the most closely analogous cases. This is a roadblock case. To figure out how to handle a roadblock case, we must look at how the Supreme Court has handled other roadblock cases.

Neither *Sitz* nor *Martinez-Fuerte* involved a regulatory inspection, yet in each the Court assessed reasonableness at the program level. Michigan searched for drunk driving and the United States for alien smuggling. Because both programs were designed to enforce the criminal laws, a simple criminal- regulatory distinction won't fly. This impels my colleagues to proclaim a multivariate approach under which the reasonableness of criminal investigations will be assessed at the program level if some other condition holds--if there is a *really* pressing need (the search for a terrorist), if the reason for the stop is closely related to the dangers of driving (the search for drunk drivers), if the stop is justified by some "special" governmental power. So much for the organizing principle with which the majority begins. Why use a principle that disintegrates at first application?

Neither *Sitz* nor *Martinez-Fuerte* uses the approach my colleagues devise. Let's work through the line of reasoning that actually appears in these opinions.

First, the privacy interest of drivers is diminished relative to the interests of people at home or in the office. E.g., *Wyoming v. Houghton*, --- U.S. ----, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). *Carroll* is close to the mark, because there the Court sustained the search of a vehicle for closed bottles of alcohol, which during Prohibition was treated the same way marijuana and cocaine are treated today. Recognition that drivers have a diminished expectation of privacy is missing from my colleagues' opinion. Instead they analogize a roadblock to a program under which "the government set up a metal detector outside

each person's home and required the person to step through it whenever he entered or left, in order to determine whether he was carrying a gun for which he lacked a permit. A principle that justified a drug roadblock would justify such surveillance." 183 F.3d at 664. No, it wouldn't; the special treatment of automobiles provides a stopping point. One may question this treatment as an original matter, but it is entrenched in the Supreme Court's jurisprudence and is the key to analyzing roadblocks.

Second, the invasion of privacy at a roadblock is slight. Detention is short, the search superficial. Indeed, the use of a dog is not a "search" at all. A roadblock administered the way Indianapolis handles its program is less intrusive than the search of one's person and belongings at an airport, another familiar kind of "roadblock" (and one that, like the Indianapolis program, is designed to find evidence of crime, such as carrying weapons aboard an aircraft). Cases since *Sitz* and *Martinez-Fuerte* describe roadblocks in these terms--as reasonable in light of the minimal intrusion, not because they are "regulatory" or conducted with an approved "motive." See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579, 587-88, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), and the passages from Chandler and Brown quoted above.

Third, a small invasion can be justified by aggregate success. "Probable cause," the level of suspicion adequate to support a custodial arrest that may last for days, is something less than a 50% likelihood; "reasonable suspicion," enough to support a frisk, means substantially less than "probable cause," *see United States v. Chaidez*, 919 F.2d 1193 (7th Cir.1990); and as a brief stop is less intrusive than a frisk, an even lower probability of detecting crime suffices. *Martinez-Fuerte* holds a probability under 1% will do for a roadblock, and in Indianapolis the probability is much greater. (The probability of finding a bomb in an airport search must be less than one in ten million, given the volume of air traffic,

but judges think this sufficient given the gravity of the evil being detected. Can my colleagues believe that drugs are so harmless that a 5% detection rate makes a search unreasonable even when the intrusion is slight?)

Fourth, the principal risk in allowing stops of vehicles without person-specific cause is that the officers will abuse the discretion thus conveyed. Some officers will stop people for the "offense" of DWB ("driving while black"); other officers, though pure of heart, may make stops at times or in places that leave the drivers apprehensive about their safety. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), holds that the fourth amendment does not tolerate standardless discretion in making stops, and the Court suggested that Delaware use instead the roadblock or checkpoint approved in *Martinez-Fuerte*. Cf. *Chicago v. Morales*, --- U.S. ----, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Indianapolis was at pains to establish a rigorous protocol for its stops. Roadblocks are fixed; the number of cars selected for inspection is fixed; the procedure following a stop is fixed. So the concern that led to *Prouse* is missing, and the first three considerations show that the roadblock is reasonable.

Because *Martinez-Fuerte* so clearly involves criminal law enforcement, the majority creates still another special rule: "such cases depend ultimately on sovereign power over foreign relations, foreign commerce, citizenship, and immigration". 183 F.3d at 664. Any implication that the Court in *Martinez-Fuerte* relied on such a special power would be incorrect. The checkpoints were between 65 and 90 miles inland. The Court's point was not that Congress has extra powers to conduct domestic searches for aliens, but that "traffic-checking practices . . . appropriately are subject to less stringent constitutional safeguards." 428 U.S. at 555, 96 S.Ct. 3074. Although *Martinez-Fuerte* involved immigration, never did the Court say that enforcement of this body of laws

should be especially easy. *See particularly* 428 U.S. at 561-62, 96 S.Ct. 3074:

> [Here] we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. See, e.g., *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948). As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. *United States v. Ortiz*, 422 U.S., at 896 n. 2, 95 S.Ct. 2585; *see Cardwell v. Lewis*, 417 U.S. 583, 590-591, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion). And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.

Everything the Court wrote about the checkpoints in *Martinez-Fuerte* can be said about the roadblocks in Indianapolis.

Treating *Martinez-Fuerte* as exemplifying a "border exception" or "immigration exception" to normal fourth amendment principles turns that amendment on its head. The

fourth amendment reflects antipathy toward efforts to enforce the customs laws by searching warehouses for dutiable goods. See Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 234-46 (1988); Telford Taylor, SEARCH, SEIZURE AND SURVEILLANCE, IN TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-44 (1969). Inland searches based on the national government's power over immigration and importation (*Martinez-Fuerte* was *not* a border search) should be evaluated under the fourth amendment's normal "reasonableness" standard; instead my colleagues treat the immigration power as a reason to reduce the force of the fourth amendment. As a side effect, the national government, the object of the fourth amendment, winds up with greater freedom to conduct searches and seizures than state and local governments, which have been brought within the fourth amendment only indirectly. Any approach that carries this "paradoxical implication" (183 F.3d at 664) must be rejected. Giving the national government more leeway than the states to conduct searches, and treating immigration and customs searches as especially easy to justify, are so at war with the text and history of the Constitution that they cannot be sustained.

Searches by the national government pose a serious threat to the citizenry; searches by local governments pose less, because movement within the country is easy. Some cities enforce their drug laws by heavy reliance on spies, infiltrators, informers, turncoats, wiretaps, and nighttime searches where battering rams smash through doors; others may substitute more civil methods, such as roadblocks where the only imposition is a five-minute wait with man's best friend outside. Which of these is most like the "methods of policing that are associated with totalitarian nations" (183 F.3d at 662)? Police and prosecutors today ply people with favors so that friends and family become informers; lying about their identity, agents wheedle their way into strangers' confidences; they search trash in the hope of finding an

incriminating scrap. Scaling back these tactics (none of which requires person-specific justification) in favor of roadblocks would make enforcement of the drug laws a good deal more reasonable. Or so at least the people may conclude.

One glory of a federal society is that the people may choose for themselves not only laws but also law-enforcement methods. State A may employ extra police to follow a high-probability-of-detection and low-sentence approach; State B may choose fewer police, fewer intrusions on privacy, but higher sentences for those who are caught. Each may be reasonable. Indianapolis selected a roadblock system, one that may catch any of its drivers. If this strikes the wrong balance, the people may throw out of office those who adopted it. Given the modest intrusion that roadblocks create for personal privacy, this is a legitimate choice for the public to make. The real threat to civil liberties comes from the national government, not from law-enforcement variations that can be avoided by driving a few miles to the east or west. Local governments should have more, not less, leeway than does the national government to decide how the tradeoff between privacy and effective law enforcement shall be handled.

James EDMOND, Joell Palmer, on their own behalf and on behalf of a class of those similarly situated, Plaintiffs,

v.

Stephen GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana; Indianapolis, Indiana; and Unknown Members of the Indianapolis Police Department, Defendants.

No. IP 98-1400-C-B/S.
United States District Court,
S.D. Indiana,
Indianapolis Division.
Nov. 18, 1998.

Motorists brought action against city, mayor, and police department, challenging constitutionality of drug interdiction checkpoints. On motorists' motions for class certification and preliminary injunction, the District Court, Barker, Chief Judge, held that: (1) class certification was warranted, and (2) checkpoints did not violate Fourth Amendment.

Plaintiffs' motions granted in part, and denied in part.

Kenneth J. Falk, Indiana Civil Liberties Union, Indianapolis, IN, for plaintiffs.

Thomas Satron, Chief Litigation Counsel, Office of Corporate Counsel, City of Indianapolis, Indianapolis, IN, for defendant.

ENTRY GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

BARKER, Chief Judge.

This matter comes before the Court on Plaintiffs' Motion for Preliminary Injunction in which Plaintiffs seek to enjoin Defendants from conducting drug interdiction checkpoints, and Plaintiffs' Motion for Class Certification.

While we *GRANT* Plaintiffs' Motion for Class Certification, we must *DENY* Plaintiffs' Motion for Preliminary Injunction because the City of Indianapolis' use of drug interdiction checkpoints does not violate the Fourth Amendment to the United States Constitution.

I. BACKGROUND[1]

Since August of 1998, the Indianapolis Police Department (IPD), in cooperation with other law enforcement agencies, has conducted at least six drug interdiction checkpoints at various locations in Indianapolis. The primary goal of the checkpoints is to interrupt the flow of illegal narcotics throughout Indianapolis.

The parties have agreed that for purposes of Plaintiffs' request for preliminary injunctive relief, it will be assumed that the checkpoints are being, and would continue to be,

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[1] The parties stipulate to the material facts. Hence, an evidentiary hearing on the preliminary injunction motion was unnecessary. *See Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir.1997) (hearing on preliminary injunction unnecessary if no genuine issues of material fact); *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 682 (7th Cir.1983) (same).

conducted in accordance with the IPD's written guidelines.[2] Those guidelines are as follows:

DRUG CHECKPOINT CONTACT OFFICER
DIRECTIVES BY ORDER OF THE CHIEF OF POLICE

1. Upon approaching vehicle, ask driver for license and registration. Advise the citizen that they are being stopped briefly at a drug checkpoint.

2. Look for signs of impairment, conduct open view examination of vehicle from outside vehicle.

3. If you have articulatable reasons to reasonably believe the person might be armed, you should ask the person to exit the vehicle where a pat-down in conformance to the rule of *Terry v. Ohio* should be performed in an attempt to locate a *weapon*.

4. If you have an articulatable reason to reasonably believe the person might be armed, you may also search the passenger compartment of the vehicle *for a weapon*.

5. A warrantless search of a vehicle is permitted if the person in control of the vehicle gives a valid consent to search. The officer may not overbear the will of the person consenting. A court will look at the totality of the circumstances to determine if the consent was given willingly and knowingly. If the person is in custody (beyond being stopped at the checkpoint), then Indiana law requires the

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[2] The parties stipulate to these material facts only for purposes of the preliminary injunction motion. (*See* Stipulation of the Parties.)

person be warned of their right to counsel before giving consent to the police to search.

6. A warrantless search of a vehicle is also permitted if the officer has probable cause to believe the vehicle contains contraband, evidence or fruits of crimes. Probable cause is determined on the basis of whether a reasonable person would believe that seizable objects would be found in the vehicle. An indication from a trained drug detection dog would establish probable cause.

7. A vehicle in police custody which is to be towed may be inventoried pursuant to General Order 9.02. The towing of a vehicle must be "reasonable" before a court will permit an inventory to be conducted.

8. EVERY VEHICLE BEING STOPPED MUST BE EXAMINED IN THE *SAME* MANNER UNTIL PARTICULARIZED SUSPICION OR PROBABLE CAUSE DEVELOPS. THERE WILL BE NO EXCEPTIONS! A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE EVERY VEHICLE STOPPED AT THE CHECKPOINT.

9. THERE WILL BE NO DISCRETION GIVEN TO ANY OFFICER TO STOP ANY VEHICLE OUT OF SEQUENCE. WHEN THE SEQUENCE OF VEHICLES HAVE (sic) BEEN TOTALLY DEALT WITH AND EITHER RELEASED OR SEIZED, *THE VERY NEXT* SEQUENCE OF VEHICLES WILL BE STOPPED. *NO VEHICLES WILL BE PERMITTED TO PASS THE CHECKPOINT BEFORE ANOTHER SEQUENCE IS STOPPED AFTER ALL VEHICLES IN THE CURRENT SEQUENCE HAVE BEEN RELEASED OR SEIZED.*

(Stipulation of the Parties, Attachment 1.)

Approximately thirty (30) Indianapolis Police Department officers are present at each checkpoint, along with patrol cars containing mobile date terminals. Stipulation of the Parties at ¶ 7.) Not every vehicle encountering the checkpoint area is stopped. Rather, prior to the operation of the checkpoint, IPD supervisors determine how many vehicles will be stopped at a time. (Marshall Depew Affidavit at ¶ 3.) The checkpoints are begun by stopping the predetermined number of vehicles. (Id. at ¶ 4.) The rest of the traffic is allowed to proceed with no interruption until the stopped vehicles have all been initially processed and either allowed to proceed or diverted for further processing. (*Id.*) When the last of the initially stopped vehicles has left, then the next group (of the same predetermined number) of vehicles is stopped for processing. (*Id.*) These stops continue in this manner, with no discretion in the number of vehicles stopped or which vehicles are stopped. (*Id.*) "When drivers are stopped, the officers ask for [their driver's] license and [vehicle] registration. If the driver does not possess a valid license and registration, then the information is run through the mobile data terminal in the adjacent police car." (Stipulation of the Parties at ¶ 7.) A typical stop lasts 2 to 3 minutes. (Depew Aff. at ¶ 5.)

II. CLASS CERTIFICATION

Plaintiffs move for class certification for purposes of injunctive and declaratory relief.[3] Federal Rule of Civil

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[3] A hearing is not required prior to granting or denying a motion for class certification. *See Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 459 (11th Cir.1996); *Hartman v. Duffey*, 19 F.3d 1459, 1473 (C.A.D.C.1994).

Procedure 23(c)(1) directs district courts to rule on the issue of class certification "as soon as practicable." *See Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir.1992). Therefore, a court must resolve such issues before it addresses dispositive motions. *See DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 463 (7th Cir.1990); *Bieneman v. City of Chicago*, 838 F.2d 962 (7th Cir.1988); *Hickey v. Duffy*, 827 F.2d 234 (7th Cir.1987). Although Plaintiffs' motion for a preliminary injunction is not dispositive, we feel compelled nevertheless to address the class certification question before resolving the issue of preliminary injunctive relief.[4]

The parties stipulate to a certification of the Plaintiffs' class, as follows:

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[4] Plaintiffs bring their Complaint as a class action for declaratory and injunctive relief and as an individual action for damages. One may well question the need to bring any part of the Complaint as a class action, as a ruling on the constitutionality of the checkpoints will inevitably apply to all motorists in Indianapolis. But in the Seventh Circuit, "it is clear that, if the prerequisites and conditions of Rule 23 have been met, a court may not deny class status because there is no 'need' for it." *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir.1976); *Bieneman v. City of Chicago*, 838 F.2d 962, 964 (7th Cir.1988); see also 7B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1785.2 (1986 & Supp.1998). Even if certification is unnecessary for practical reasons, certification may not be denied if Rule 23 is satisfied. *See Paul v. State of Indiana Election Board*, 743 F.Supp. 616, 618 (S.D.Ind.1990) (Barker, J.).

> any and all persons driving vehicles who have been stopped or [are] subject to being stopped in the future at the drug interdiction roadblocks maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drugs and unlawful drug use.

(Stipulation to Certify Cause as a Class Action.)

Although the parties stipulate to the certification, the court has a duty to evaluate independently the proposed class to ensure its compliance with Fed.R.Civ.P. 23. *See Retired Chicago Police Assn. v. City of Chicago*, 7 F.3d 584, 599 (7th Cir.1993). Rule 23(a) sets forth the general prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In this case, Plaintiffs clearly meet these threshold requirements. First, the class probably exceeds one half million members and continues to grow each day, rendering joinder of all members of the class impracticable. Second, the legal issues surrounding the roadblocks are largely the same, with the principal dispute being their constitutionality. Third, the claims of the representative parties are typical of the claims of the class. Finally, the party representatives appear committed to this cause and their counsel is a very

capable and skilled attorney, with extensive experience in similar matters.

Rule 23(b) contains additional requirements for class actions. First, separate actions must create a risk of inconsistent adjudications or adjudications that would be dispositive of the interest of other members not parties. *See* Fed.R.Civ.P. 23(b)(1). Second, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *See* Fed.R.Civ.P. 23(b)(2).[5]

Both of these requirements are also easily satisfied here. Separate adjudications on this issue would certainly create the risk of inconsistent rulings, in addition to potentially disposing of the issue of the checkpoints' constitutionality without the involvement of all class members. Further, Defendants' actions impact all the proposed class members as a group, thereby making injunctive relief appropriate. Accordingly, we find that Plaintiffs satisfy all the conditions

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[5] Fed.R.Civ.P. 23(b)(3) requires that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. These requirements, however, apply only to classes that seek damages. They do not apply to a class, like the one proposed here, that seeks only injunctive and declaratory relief. *See Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1267 (7th Cir.1983).

for a Rule 23(b)(2) class action, and we thus *CERTIFY* Plaintiffs' class.

III. PRELIMINARY INJUNCTION

We now turn to the heart of this dispute--Plaintiffs' Motion for Preliminary Injunction. When evaluating a motion for preliminary injunctive relief, we must determine whether the party seeking relief has demonstrated that: (1) there is a reasonable likelihood of success on the merits of its claim; (2) no adequate remedy at law exists; (3) irreparable harm will result if preliminary injunctive relief is denied; (4) the irreparable harm suffered without preliminary injunctive relief outweighs the irreparable harm the nonmoving party will suffer if the preliminary injunction is granted; and (5) the preliminary injunction will not harm the public interest. *Platinum Home Mortgage Corp. v. Platinum Financial Group, Inc.*, 149 F.3d 722, 726 (7th Cir.1998); *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir.1997). "The threshold consideration in a motion for a preliminary injunction is the moving party's likelihood of success on the merits of the underlying claim." *Id.*

Plaintiffs contend that Defendants have violated the Fourth Amendment by using roadblocks to seize motorists without individualized suspicion for the primary purpose of determining if they possess or are under the influence of illegal drugs.[6]

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[6] The Fourth Amendment was incorporated against the states by the Fourteenth Amendment's Due Process

[Footnote continued on next page]

There is no question that stopping a vehicle at a traffic checkpoint by law enforcement officers constitutes a seizure within the meaning of the Fourth Amendment. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990); *United States v. Trevino*, 60 F.3d 333, 336 (7th Cir.1995). To be reasonable under the Fourth Amendment, a seizure ordinarily must be based on individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). However, the Supreme Court has held that individualized suspicion is unnecessary when the seizure is a brief stop for questioning or observation at a sobriety or immigration roadblock. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (sobriety); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (immigration). The Court has also strongly implied that such roadblocks for driver's license and vehicle registration checks are permissible. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (approving in dicta); *see also United States v. Trevino*, 60 F.3d 333, 336 (7th Cir.1995) (upheld checkpoint for license and insurance checks).

The Supreme Court has held that a Constitutional challenge to a law enforcement checkpoint turns on whether the initial stop at the checkpoint was reasonable. *Id.; see also Trevino*, 60 F.3d at 336. This, in turn, requires a balancing of the intrusion on the individual's Fourth Amendment rights occasioned by the initial stop against the promotion of legitimate governmental interests (hereinafter

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[Footnote continued from previous page]

Clause. *See Contreras v. City of Chicago*, 119 F.3d 1286, 1290 (7th Cir.1997).

referred to as the *Brown* balancing test). *Sitz*, 496 U.S. at 449-50, 110 S.Ct. at 2484-85; *Brown v. Texas*, 443 U.S. 47, 49, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). In applying the *Brown* balancing test, the Supreme Court has stated that district courts must consider the circumstances of both the "objective intrusion" of the seizure--the duration of the stop itself and the intensity of any questioning and visual inspection that might attend it, *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486,--and the "subjective intrusion"--its potential for generating fear and surprise to law-abiding motorists. *Id.; see also Trevino*, 60 F.3d at 336.

A) *BROWN BALANCING TEST DETERMINES THE CONSTITUTIONALITY OF DEFENDANTS' CHECKPOINTS*

Plaintiffs contend that the *Brown* balancing test does not apply in this case and, thus, cannot justify the checkpoints. According to Plaintiffs, the *Brown* balancing test is appropriate only if the government can demonstrate a "special need" for the checkpoints beyond the normal need for criminal law enforcement. (Plaintiffs' Memorandum in Support at 7-9) (*citing Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). Plaintiffs contend that the public interest cited here--drug interdiction--is not a "special need" that checkpoints may be used to target.

Unfortunately for Plaintiffs, the Supreme Court in *Sitz*, 496 U.S. at 451, 110 S.Ct. 2481, has previously rejected this analysis, holding that the "special needs" requirement set

forth in *Von Raab* and *Skinner*[7] does not apply to "cases dealing with police stops of motorists on public highways." *Id.* at 496 U.S., at 450, 110 S.Ct., at 2485. Instead, the Court directed that the reasonableness of a seizure of a motorist on a public highway without individualized suspicion be determined solely on the basis of the *Brown* balancing test. *Id.* Therefore, consistent with *Sitz*, we evaluate the constitutionality of the checkpoints before us by applying the *Brown* balancing test.

B) *APPLYING THE BROWN BALANCING TEST*

1) *GOVERNMENT'S INTEREST*

The government's interest in interdicting narcotics is beyond serious dispute. The narcotics industry is "one of the greatest problems affecting the health and welfare of our population," *Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 1392, 103 L.Ed.2d 685 (1989), and has created a "veritable national crisis in law enforcement." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 105 S.Ct. 3304, 3309, 87 L.Ed.2d 381 (1985). We need not dwell further on this issue.

The more significant issue is whether the checkpoints in controversy here are effective in addressing the drug problem. We do not attempt to determine, however, whether the use of checkpoints is the most effective means of achieving the government's objectives, or even whether it is more or less effective than other means. It is not for the

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[7] Both Skinner and Van Raab address mandatory drug testing, not checkpoints.

courts to decide "which among reasonable alternative law enforcement techniques should be employed .... [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz*, 496 U.S. at 453-54, 110 S.Ct. at 2487. The courts must decide only whether, when evaluated against the importance of the governmental interest and the degree of intrusion, the checkpoints are at least reasonably effective as a tool for advancing the government's interest. *Id.*

The uncontroverted evidence establishes that the checkpoints in this case have resulted in fifty-five drug related arrests out of a total of 1161 vehicles stopped, representing an effectiveness ratio (number of arrests divided by number of vehicles stopped) of approximately 4.7%. (*See* Defendants' Exhibit B.) Although at first blush this figure may appear low, the Supreme Court has approved checkpoints where the effectiveness ratio was 1.6% (*Sitz, supra*--sobriety checkpoint) and 0.5% (*United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)--immigration checkpoint). Relative to these other cases, the checkpoints in the instant case are substantially more effective.

2) *LEVEL OF INTRUSION*

Next we address the extent of the intrusion imposed upon the individual motorists subjected to the checkpoints. In making this examination, we consider both the objective and subjective intrusions that the motorists have necessarily encountered. *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486.

a) *Subjective Intrusion*

"[T]he critical factors in assessing a checkpoint's 'subjective intrusion' are, first, whether it is set up in a manner which informs incoming motorists that this is an official stop and, secondly, whether it gives the officers conducting the stop unbridled discretion to randomly target individual motorists." *Trevino*, 60 F.3d at 337; *see also Sitz, supra.*

We are told that the individual motorists are informed that the checkpoints are official by virtue of the obvious massive law enforcement presence at each checkpoint, including a large number of uniformed officers with fully marked police vehicles. Additionally, the dates of the checkpoint operations (not their locations) have been released in advance to the public, resulting in media coverage which has increased public awareness of their existence.

Second, and perhaps more importantly with regard to analyzing the degree of subjective intrusion, is the amount of discretion afforded law enforcement officers at the scene. The constitutionality of a checkpoint often turns on officer discretion. *See Sitz, supra; Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116; *United States v. Huguenin*, 154 F.3d 547, 557 (6th Cir.1998).

The IPD guidelines restrict the discretion of officers on the scene, but do not eliminate it altogether. For example, the City acknowledges that "[i]n the event a problem occurs which requires a change in the pattern of stopping vehicles, an on scene supervisor will determine what stopping sequence is appropriate and document the change with an appropriate explanation for the change." (Government's Response Brief at 14.) The on-scene supervisor is provided discretion apparently in order to ensure that traffic backups do not create an unconstitutional seizure by virtue of the

length of the traffic delay--a valid concern. Although officers at a checkpoint should be vested with the least amount of discretion reasonable under the circumstances, we recognize that some limited discretion is necessary to properly address concerns such as traffic backups or ensnarlments that may inherently accompany the checkpoint process. Here, a supervisor's authority is limited to changing the stopping sequence only when traffic problems occur, not simply on a whim or on some other basis. This is an allowance of minimal discretion and has been afforded only to the on-scene supervisor. It is sufficiently circumscribed to pass constitutional muster. In all other respects, the policy directs that the on-scene officers operate without discretion. Their actions are strictly regulated by the official checkpoint guidelines that have been promulgated by the Chief of Police. Accordingly, we hold that the level of subjective intrusion experienced by motorists stopped at the police checkpoints is minimal.

b) *Objective Intrusion*

The level of objective intrusion is determined by the duration of the stop itself and the intensity of any questioning and visual inspection that might attend it. *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486.

The typical stop at the Indianapolis checkpoints lasts approximately 2 to 3 minutes. (*See* Depew Aff. ¶ 5.)[8] As previously discussed, the checkpoints are conducted so as to

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[8] Of course, further detention of a particular motorist occurs when officers develops individualized suspicion of wrongdoing.

avoid traffic delays, which could cause a motorist to be detained, that is, "seized" for a duration exceeding constitutional limits.[9] *See Merrett v. Moore*, 58 F.3d 1547, 1552 (11th Cir.1995), *cert. denied*, 519 U.S. 812, 117 S.Ct. 58, 136 L.Ed.2d 21 (1996). As it is, the duration of the stops is consistent with checkpoints approved by the Supreme Court in both Sitz and Martinez-Fuerte. In those cases, the Court upheld the constitutionality of brief roadblock seizures that lasted about twenty-five seconds at a sobriety checkpoint, (*Sitz*, 496, U.S. at 444-56, 110 S.Ct. at 2483-88), and seizures that lasted 3 to 5 minutes at an immigration checkpoint away from the border. *Martinez-Fuerte*, 428 U.S. at 544-48, 96 S.Ct. at 3077-78.

The questioning and inspection occurring during the checkpoint stops in this case include asking for the motorist's driver's license and vehicle registration and having a narcotics dog sniff the exterior of their vehicle. Though asking for a motorist's license and registration is fairly non

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[9] Whether one is "seized" while waiting in traffic to reach the checkpoint and, thus, whether that delay should be considered in assessing the reasonableness of the operation, depends on whether the person reasonably believed he or she was not free to turn around and avoid the checkpoint. *Merrett v. Moore*, 58 F.3d 1547, 1552 (11th Cir.1995), *cert. denied*, 519 U.S. 812, 117 S.Ct. 58, 136 L.Ed.2d 21 (1996). "The clock for assessing the reasonableness of the delay caused by the checkpoint begins to run when a reasonable person would believe he cannot leave the line and avoid the checkpoint." *Id.* (*citing United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

intrusive, having a dog sniff the exterior of a motorist's vehicle warrants a closer look. Here, the drug detection dog sniffs only the exterior of the vehicle and is positioned in a place the dog has the right to be, suggesting that the intrusion is similar to that of an officer looking for contraband in plain view. *Cf. Horton v. California*, 496 U.S. 128, 142, 110 S.Ct. 2301, 2311, 110 L.Ed.2d 112 (1990). Indeed, the Seventh Circuit has held that "[a] sniff test, by a well-trained narcotics detection dog, involves only minimal intrusion into a person's privacy." *United States v. Teslim*, 869 F.2d 316, 323 (7th Cir.1989) (*citing United States v. Place*, 462 U.S. 696, 706-707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983)). Other courts have determined specifically that a narcotics dog's sniff of the exterior of a vehicle does not, in itself, constitute a "search." *See United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.1993); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir.1991); *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir.1990). The drug detection sniff and the license and registration check together and separately constitute a minimal and thus an acceptable degree of intrusion.

3) *CONCLUSION: CHECKPOINTS CONSTITUTIONAL UNDER BROWN BALANCING TEST*

Overall, the checkpoints in controversy are targeted effectively and are limited sufficiently to combat the city's drug crisis with minimal intrusion on motorists. Accordingly, we hold that the checkpoint procedures are constitutional under the *Brown* balancing test.

An examination of the two leading Supreme Court cases on highway roadblocks--*Sitz*, 496 U.S. 444, 110 S.Ct. 2481 (1990) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)--reveals strong support for our holding. In *Sitz*, the Court approved the use of sobriety checkpoints where the motivation was the

government's "interest in preventing drunk driving." 496 U.S. at 455, 110 S.Ct. 2481. There, the Court simply applied the *Brown* balancing test and determined that the magnitude of the drunk driving problem, coupled with the effectiveness of the checkpoints, outweighed the minimal intrusion on motorists. Other than the shear magnitude of the drunk driving crisis, the Court did not identify any other special or regulatory need to justify the use of checkpoints to combat drunk driving. *Id.*

Similar to the government's strong interest in preventing drunk driving, the narcotics checkpoints in this case are justified by the government's similarly strong interest in preventing drug trafficking. The intrusion on the rights of motorists in this case is no greater than the level of intrusion approved in *Sitz*. If *Sitz* were the only Supreme Court discussion of roadblocks, one might attempt to distinguish sobriety checkpoints from narcotics checkpoints on the basis that sobriety checkpoints relate directly to highway safety. Prior to *Sitz*, however, the Supreme Court in *Martinez-Fuerte* upheld a checkpoint away from the international border to search for illegal aliens, which need obviously had no direct relation to highway safety.

Applying the *Brown* balancing test, the Court in *Martinez-Fuerte* held that routine checkpoint stops were necessary because the flow of illegal aliens cannot be controlled effectively at the border. *Id.* at 556-557, 96 S.Ct. at 3082-3083. The Court concluded that the checkpoint stop to search for illegal aliens was a "quite limited intrusion" on Fourth Amendment interests. *Id.* at 557-558, 96 S.Ct. at 3082-3083.

Like illegal aliens in *Martinez-Fuerte,* the flow of narcotics cannot be effectively stopped at the border or through other conventional law enforcement methods, as expressed by the police department in the case at bar and as

evidenced by the continuing drug problem. Indeed, narcotics are easily hidden in an automobile, in that sense posing even greater detection problems than do illegal aliens. Absent the holding in *Sitz*, it might be argued that immigration checkpoints are distinguishable from narcotics checkpoints because immigration checkpoints advance an administrative purpose, not a criminal one. *Sitz*, however, explicitly disposes of that contention, holding that it is permissible for a checkpoint to implicate possible criminal sanctions, *i.e.* arresting drivers for drunk driving.[10] Together, *Sitz* and *Martinez-Fuerte* make it clear that an otherwise valid checkpoint is not unconstitutional simply because its primary purpose is to interdict narcotics traffic.[11]

Although neither the Supreme Court nor the Seventh Circuit has addressed specifically whether a checkpoint for

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[10] Moreover, as we have noted previously, *Sitz* does not require a "special need."

[11] Checkpoints have been upheld routinely for other purposes as well. *See, e.g., United States v. Trevino*, 60 F.3d 333 (7th Cir.1995) (upheld checkpoint whose purpose was to detect equipment violations and prevent uninsured and non-licenced motorists from operating on the highways); *United States v. O'Mara*, 963 F.2d 1288, 1291-92 (9th Cir.1992) (reasonable articulable suspicion not required when police utilized highway roadblock to stop all cars leaving national park in response to report of illegal firearms discharges); *Romo v. Champion*, 46 F.3d 1013, 1020 (10th Cir.1995) (reasonable articulable suspicion not required to stop car at roadblock on public thoroughfare which was only visitor route to prison).

the official purpose of interdicting drug traffic is permissible under the Fourth Amendment, an examination of the various state and federal cases involving roadblocks whose purpose was, wholly or in part, to interdict narcotics reveals further support for our conclusion that the Indianapolis roadblocks are constitutional. Three categories of narcotics roadblocks emerge from those cases.

First is the narcotics roadblock whose stated purpose is to check motorists' driver's licenses and registrations, but whose actual purpose is to search for narcotics. These roadblocks are known as "pretext" roadblocks and often get struck down as unconstitutional. Typically, the problem with pretext roadblocks is that they leave too much discretion in the hands of the officers on the scene because the official guidelines do not cover the actual purpose, to wit, interdicting narcotics. *See United States v. Huguenin*, 154 F.3d 547 (6th Cir.1998) (pretext roadblocks provide too much discretion to officers on the scene); *Garcia v. State*, 853 S.W.2d 157 (Tex.Ct.App.1993) (driver's license checkpoint unconstitutional because it was a subterfuge for more general criminal investigation).

The second category includes narcotics roadblocks whose sole stated and actual purpose is to interdict narcotics. Few cases address this type of roadblock, but typically they are upheld because the official guidelines cover the narcotics purpose, thus limiting officer discretion. *See State v. Damask*, 936 S.W.2d 565 (Missouri 1996). The courts also recognize a compelling public interest in stopping the flow of illicit drugs. *Id.*

The third category includes narcotics roadblocks whose stated and actual purposes include searching for narcotics *and* checking licenses and registrations. These roadblocks are almost always upheld because, even assuming a roadblock for the sole purpose of interdicting narcotics is

invalid, another valid reason nevertheless exists for the checkpoint, to wit, license and registration checks. *See Merrett v. Moore*, 58 F.3d 1547 (11th Cir.1995) (holding that a mixed motive roadblock, used primarily to interdict drugs, but also to check driver's licenses and registration, was constitutional);[12] *State v. Everson*, 474 N.W.2d 695 (N.D.1991) (finding that a safety inspection checkpoint, the primary purpose of which was actually drug interdiction, to be constitutional); *but see Galberth v. United States*, 590 A.2d 990 (D.C.App.1991) (checkpoint for drugs and firearms unconstitutional).

The checkpoints in this case fall in the third category. They obviously are not "pretext" roadblocks since interdicting narcotics is one of their official purposes. In fact, both Defendants and Plaintiffs stress the primary purpose of the roadblocks as the interdiction of narcotics, suggesting that the checkpoints fall into the second category. However, a secondary purpose of the checkpoints is to check driver's licenses and vehicle registrations; thus, the checkpoints are more appropriately considered in category three. This distinction is important when considering the cases upon which Plaintiffs rely.

Plaintiffs cite the Sixth Circuit's recent decision in *United States v. Huguenin*, 154 F.3d 547 (6th Cir.1998), in which a narcotics checkpoint was declared unconstitutional. In that case, the police set up a checkpoint whose official purpose

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[12] The Eleventh Circuit in *Merrett* noted that "[n]o question is presented about whether a state can lawfully conduct a roadblock solely to intercept illegal drugs; and we leave that question open." *Id.* at 1551 n. 3.

was to review driver's licenses and registrations. The court, however, finding that the actual purpose of the checkpoint was to search for drugs, went on to hold that the checkpoint violated the Fourth Amendment because:

> The evidence indicates that when the purpose of a checkpoint is pretextual, the guidelines set up for its ostensible operation are not truthful and are not followed, and too large a degree of discretion is left to the officer in the field on the operation of the subterfuge.

Id. at 557.

The Sixth Circuit in *Huguenin* was obviously concerned about the amount of discretion given officers on the scene, since there were no guidelines governing their search for narcotics. That concern does not afflict the policies in the instant case, however. The IPD has made it clear that the purpose for its checkpoints is to interdict narcotics traffic and, accordingly, has structured the official checkpoint guidelines, which minimize officer discretion, around that purpose. Thus, Huguenin is inapplicable to the instant case.

Plaintiffs also cite *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir.1992), in support of their position. Like *Huguenin*, the checkpoint in Morales-Zamora was ostensibly set up to check licenses and registrations. At trial, it was established that the actual and undisclosed purpose of the checkpoint was to interdict drug traffic, which became the issue on appeal. The legality of a checkpoint for narcotics was not raised since the government conceded that "under the Fourth Amendment it could not set up a roadblock for the sole purpose of subjecting all the stopped vehicles to a canine sniff of the exterior of the car." *Id.* at 151. The Tenth Circuit concluded that the purpose of the checkpoint was to search

for narcotics and, given the government's concession, held the checkpoint unconstitutional.

Morales-Zamora does not help Plaintiffs. The Tenth Circuit did not analyze the question of whether the narcotics checkpoint was constitutional because the government had conceded that such a checkpoint would violate the Fourth Amendment. Accordingly, once the court determined that the checkpoint was a pretext for narcotics interdiction, it concluded without further discussion that the checkpoint was unconstitutional. In addition, the narcotics purpose in *Morales-Zamora* was secondary to the license/registration check, rather than being the official policy, unlike the instant case where the checkpoints' official purpose is to interdict drug traffickers and where the official guidelines limit officer's discretion in pursuing that goal.[13] In short, Morales-Zamora is distinguishable from the instant case based on differing factual and legal circumstances.

Accordingly, based on the *Brown* balancing test and consistent with the relevant case law, the IPD checkpoints pass constitutional muster and Plaintiffs' Motion for Preliminary Injunction must be and is *DENIED*. This ruling should not be construed as a judicial abandonment of the Fourth Amendment, by which courts permit any stop-and-search procedure which is instituted by law enforcement and

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[13] *See United States v. Galindo-Gonzales*, 142 F.3d 1217 (10th Cir.1998) (suggesting that a pretextual checkpoint for the actual purpose of searching for illegal aliens would be unconstitutional, even though it would be permissible if its *official* purpose were to search for illegal aliens).

is justified by the compelling circumstances our country faces in waging a war against drugs. We approve Defendants' use of checkpoints for drug interdiction, but only because the policy under which they are effected is sufficiently non-intrusive to justify their use. To be sure, a motorist's right to be free from unreasonable searches and seizures must not be trivialized or cavalierly sacrificed. Police actions must comport fully with Fourth Amendment standards, and when they do, they deserve to be upheld.

C) *INDIANA CONSTITUTION CLAIM*

Plaintiffs allege in their Complaint that, in addition to their shortcomings under the United States Constitution, the checkpoints also violate the Indiana Constitution's prohibition against unreasonable searches and seizures under Article 1, Section 11. Plaintiffs do not explicate this position in their Motion for Preliminary Injunction, relying only on a passing mention at the conclusion of their Reply Brief. This inadequate discussion undermines Plaintiffs' ability to establish its likelihood of succeeding on the merits of this claim.

The Indiana Supreme Court has frequently noted that "[s]eparate and apart from the federal Fourth Amendment analysis, the Indiana Constitution provides an independent prohibition against unreasonable searches and seizures under Article 1, Section 11." *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1152 (Ind.1997); *see also Moran v. State*, 644 N.E.2d 536, 540 (Ind.1994); *State v. Lamar*, 680 N.E.2d 540, 543 (Ind.Ct.App.1997). To date, however, the Indiana courts have not had occasion to address whether a checkpoint for the purpose of searching for narcotics is valid under the Indiana Constitution. *See State v. Garcia*, 500 N.E.2d 158 (Ind.1986) (upheld sobriety checkpoint under the Fourth Amendment, but did not address Indiana Constitution); *Covert v. State*, 612 N.E.2d 592 (Ind.App.1993) (same). We

decline Plaintiffs' invitation to attempt to answer this question on the limited and one-sided briefing now before us. Any, in any event, should today's ruling on Plaintiffs' federal claim become our final ruling on injunctive relief, we would, in all likelihood, determine that in the interests of judicial economy, convenience, fairness and comity, it is appropriate to relinquish our pendent jurisdiction over Plaintiffs' state law claim, per *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-351, 108 S.Ct. 614, 618-619 n. 7, 98 L.Ed.2d 720 (1988) and *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Accordingly, Plaintiffs' Motion for Preliminary Injunction based on the Indiana Constitution is *DENIED*.

IV. *CONCLUSION*

For all the aforereferenced reasons, Plaintiffs' Motion for Class Certification is *GRANTED*. However, Plaintiffs' Motion for Preliminary Injunction is *DENIED* because Defendants' policy and use of drug interdiction checkpoints do not violate the Fourth Amendment. Plaintiffs' claim under the Indiana Constitution is also *DENIED* based on their failure to establish a likelihood of success on its merits.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 18, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Diane P. Wood, Circuit Judge

JAMES EDMOND and JOELL PALMER, on their own behalf and on behalf of a class of those similarly situated,	)	
Plaintiffs-Appellants	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 98-4124 v.	)	
STEPHEN GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana; CITY OF INDIANAPOLIS, INDIANA; and UNKNOWN MEMBERS OF THE INDIANAPOLIS POLICE DEPARTMENT,	)	No. 98 C 1400
	)	Sarah Evans Barker, *Chief Judge*.
Defendants-Appellees.	)	

ORDER

On July 21, 1999, defendants-appellees filed a petition for rehearing with suggestion for rehearing *en banc* and on August 3, 1999, pl;aintiffs-appellants filed an answer. All the judges on the original panel have voted to deny* the petition, and none of the active judges has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore **DENIED**.

---

* Statement of Easterbrook, Circuit Judge, respecting the denial of rehearing en banc. The question presented by this case is an important and recurring one, but I have not called for a vote on the petition for rehearing en banc. The court's opinion shows that a conflict among the circuits (and state courts) preexisted the panel's opinion, and it would be pointless to sit en banc just to consider moving from one side of that conflict to another. Only a higher court can give a definitive answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES EDMOND, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. IP 98-1400 C B/S
	)	
STEPHEN GOLDSMITH, *et al.*,	)	
	)	
	)	
Defendants.	)	

STIPULATION OF THE PARTIES

Come now the parties, by their counsel, and file their Stipulation. The parties acknowledge that this Stipulation is not designed to settle this cause, but is designed to remove the factual issues so that the Court may decide the preliminary injunction request of the parties.

1. Attached to this Stipulation as Attachment 1 is the policy which is currently in effect concerning the drug checkpoints being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis.

2. The plaintiffs do not agree that this policy was applied to them. Nevertheless, the defendants agree that they will comply with the attached policy in the future and that they will also comply with the following addenda to the policy --

> - The City of Indianapolis will endeavor to operate the drug checkpoints in such a way that the total elapsed time that a vehicle is stopped, absent some probable cause or reasonable suspicion, is five minutes or less.

3. The City of Indianapolis intends to continue conducting the drug checkpoints pursuant to Attachment 1.

4. Statistics kept by the City of Indianapolis disclose that as of this date there have been six (6) checkpoints and 1161 vehicles have been stopped.

5. Attached hereto as Attachment 2 are statistics generated by the City of Indianapolis as a result of the checkpoints.

6. When the checkpoints are established the police stop a set number of vehicles and have them pass through the checkpoints as described in the attached document. Once a vehicle is selected to pass through the checkpoint the vehicle must pass through it.

7. There are approximately thirty (30) Indianapolis Police Department officers at the checkpoints. Police cars with mobile data terminals are present. When drivers are stopped, the officers ask for license and registration. If the driver does not possess a valid license and registration, then the information is run through the mobile data terminal in the adjacent police car.

/s/ jllegible
Kenneth J. Falk
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Attorney for Plaintiffs

/s/ illegible
Thomas Satrom
Chief Litigation Counsel
200 E. Washington St.,
Suite 1601
Indianapolis, IN 46204
317/327-4055

Attorney for Defendants

DRUG CHECKPOINT CONTACT OFFICER
DIRECTIVES BY ORDER OF THE CHIEF OF POLICE

1. Upon approaching vehicle, ask driver for license and registration. Advise the citizen that they are being stopped briefly at a drug checkpoint.

2. Look for signs of impairment, conduct open view examination of vehicle from outside vehicle.

3. If you have articulatable reasons to reasonably believe the person might be armed, you should ask the person to exit the vehicle where a pat-down in conformance to the rule of *Terry v. Ohio* should be performed in an attempt to locate a weapon.

4. If you have an articulatable reason to reasonably believe the person might be armed, you may also search the passenger compartment of the vehicle for a weapon.

5. A warrantless search of a vehicle is permitted if the person in control of the vehicle gives a valid consent to search. The officer may not overbear the will of the person consenting. A court will look at the totality of the circumstances to determine if the consent was given willingly and knowingly. If the person is in custody (beyond being stopped at the checkpoint), then Indiana law requires the person be warned of their right to counsel before giving consent to the police to search.

6. A warrantless search of the vehicle is also permitted if the officer has probable cause to believe the vehicle contains contraband, evidence or fruits of crime. Probable cause is determined on the basis of whether a reasonable person would believe that seizable objects would be found in the vehicle. An indication from a trained drug detection dog would establish probable cause.

– ATTACHMENT 1 –

7. A vehicle in police custody which is to be towed may be inventories pursuant to General Order 9.02. The towing of a vehicle must be "reasonable" before a court will permit an inventory to be conducted.

8. EVERY VEHICLE BEING STOPPED MUST BE EXAMINED IN THE SAME MANNER UNTIL PARTICULARIZED SUSPICION OR PROBABLE CAUSE DEVELOPS. THERE WILL BE NO EXCEPTIONS! A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE EVERY VEHICLE STOPPED AT THE CHECKPOINT.

9. THERE WILL BE NO DISCRETION GIVEN TO ANY OFFICER TO STOP ANY VEHICLE OUT OF SEQUENCE. WHEN THE SEQUENCE OF VEHICLES HAVE BEEN TOTALLY DEALT WITH AND EITHER RELEASED OR SEIZED, THE VERY NEXT SEQUENCE OF VEHICLES WILL BE STOPPED. NO VEHICLES WILL BE PERMITTED TO PASS THE CHECKPOINT BEFORE ANOTHER SEQUENCE IS STOPPED AFTER ALL VEHICLES IN THE CURRENT SEQUENCE HAVE BEEN RELEASED OR SEIZED.

1998 Drug Road Blocks

	#1 West 8/13	#2 West 9/21	#3 East 9/24	#4 South 9/29	#5 North 10/1	#6 East 10/6	Total
W/M	7	7	5	16	5	4	44
B/M	9	5	2	6	10	--	32
W/F	1	6	2	5	3	2	19
B/F	1	2	--	2	3	--	8
H/M	1	--	--	2	--	3	6
Total	19	20	9	31	21	9	109
Drug	13	12	2	16	9	3	55
Driving	4	8	7	14	10	6	49
Other	2	--	--	1	2	--	5
# of cars	200	210	220	228	214	89 (rain)	1,161

– ATTACHMENT 2 –

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES EDMOND, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. IP 98-1400 C B/S
	)	
STEPHEN GOLDSMITH, *et al.*,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF MARSHALL DEPEW

I, Marshall DePew, being first duly sworn under oath, state that I am a sergeant in the Indianapolis Police Department. If called upon to testify, my testimony would be as follows:

1. I have personal knowledge of the matters contained in this affidavit, I am over the age of 21 years, I am competent to testify and will testify to the information contained in this affidavit.

2. I am assigned to the West District and am one of the officers responsible for designing and implementing drug interdiction checkpoints.

3. Checkpoint locations are selected at the supervisorial level weeks in advance based on geographical suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which will minimize the interference with normal traffic flow and permit observation of traffic approaching the checkpoint. West District has so far chosen to perform its checkpoints during the day time from approximately 10:00 a.m. to 3:00 p.m., although this

may change in the future. Operation during daylight benefits officer safety, and this time period does not interfere with rush hour traffic. In my experience, drug traffickers are as likely to be on the road at this time as any other, so the checkpoints are as effective during this time as they would be at any other time of day.

4. The checkpoints are identified with lighted signs reading "NARCOTICS CHECKPOINT _ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." Marked IPD cards with flashers on are also present. The checkpoints are begun with predetermined number of cars being stopped. The rest of the traffic is allowed to proceed with no interruption until the stopped cars have all been initially processed and either allowed to proceed are diverted for further processing. When the last of the initially stopped cars has left, then the next group (of the same predetermined number) of vehicles is stopped for processing. There are no deviations from this sequencing permitted and under no circumstances are random stops permitted or utilized. Each vehicle in the predetermined number is stopped, without regard to the nature of the vehicle. If a police car, fire engine or ambulance happens to be in the group, than that vehicle is processed in exactly the same fashion as all other vehicles.

5. The stopped cars are met by a team of officers, at least one of whom is in full uniform. The driver is asked for license and registration and informed that he or she has entered a narcotics checkpoint. At this time, a drug detection dog is walked around the exterior of the vehicle. If the license and registration are present and valid, and there is no probable cause presented by the officer's plain-view, plain-smelling examination or a dog alert, then the motorist proceeds without any further delay. We attempt to accomplish this in as little time as possible. In my experience, the average stop is in the two-to-three minute range or less for a vehicle not subject to further processing.

Because no vehicles are stopped until the processing of the prior vehicles has been completed, there is no back-up to traffic flow caused beyond that which may occur under any circumstances at these locations. In the event that a traffic back-up did somehow occur, we would either suspend operation of the checkpoint or institute traffic control measures until the back-up had cleared.

6. If no valid license is present, then the driver's name is run through the mobile data terminal located in the police vehicles at the checkpoint to determine if the driver has a valid license and if there are any outstanding warrants for that individual. This check may take an additional 15 seconds to two minutes.

7. In the event that there are outstanding warrants or that a plain-view, plain-smell examination or dog alert give rise to probable cause, then the driver and vehicle are subject to further processing in exactly the same manner as would be the case in any other circumstance.

8. At the first roadblock conducted, we apprehended a major trafficker in possession of 20 pounds of marijuana. There is no reason to believe he would have been detected absent the roadblock.

Further affiant sayeth not.

/s/ illegible
Marshall DePew

[Notarization omitted]

(2)

99-1030

~~No. 95-870~~

Supreme Court, U.S.
FILED
JAN 10 2000
CLERK

In The

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND BART PETERSON, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS,

Petitioners,

v.

JAMES EDMOND, JOELL PALMER, ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH J. FALK
Counsel of Record

JACQUELYN E. BOWIE
SEAN C. LEMIEUX
E. PAIGE FREITAG
CHRISTOPHER M. GIBSON
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Are traffic checkpoints where motor vehicles are stopped without probable cause for the sole purpose of attempting to ascertain probable cause to conduct searches of the vehicles for unlawful drugs, violative of the Fourth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioners at the time of the filing of the Petition were the City of Indianapolis, Indiana and Stephen Goldsmith in his official capacity as Mayor of the City of Indianapolis. On January 1, 2000, Bart Peterson was inaugurated as Mayor of the City of Indianapolis. His name has been substituted pursuant to Rule 35.3.

Respondents are James Edmond and Joell Palmer, on their own behalf and on behalf of a certified class. The class is defined as:

> any and all persons driving vehicles who have been stopped or are subject to being stopped in the future at the drug interdiction roadblocks maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drug use.

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STATEMENT OF THE CASE

Since August of 1998, the City of Indianapolis, through the Indianapolis Police Department, has been conducting drug interdiction roadblocks or checkpoints in the City. (Petitioner's Appendix [hereinafter "Pet. App."] 25a). The sole purpose of the roadblocks is to stop the flow of unlawful drugs in Indianapolis. (Pet. App. 51a).[1]

ARGUMENT

Reasons for Denying the Writ

Plenary review in this case is inappropriate for three reasons. First, this case comes to the Supreme Court in

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[1] The parties stipulated that the checkpoints were designed "to interdict unlawful drugs in Indianapolis." (Pet. App. 51a). The checkpoint policy is formally entitled "Drug Checkpoint Contact Office Directives By Order of the Chief of Police" and it makes clear that the sole purpose of the checkpoints is to effect a stop of cars so that a determination can be made as to whether there is probable cause to conduct a further search. (Pet. App. 53a). The trial court reviewed the uncontested facts and found that a secondary purpose of the checkpoints was to check licenses and registrations. (Pet. App. 44a). However, the City has never advanced an actual secondary or a regulatory purpose. The purpose for stopping the cars is to be able to discover illegal activity, either through "plain view" searches, or through creating probable cause either by utilizing drug sniffing dogs or in some other way. The Seventh Circuit recognized that the purpose of the roadblocks is "to catch drug offenders" and that the "program of drug roadblocks belongs to the genre of general programs of surveillance which invades privacy wholesale in order to discover evidence of crime." (Pet. App. 2a, 9a).

the context of an appeal of the denial of a preliminary injunction. There is not a well developed record and the district court should be allowed to fully develop the factual record prior to plenary review. Secondly, although the question of the constitutionality of drug interdiction checkpoints combined with legitimate regulatory stops is one that may very well split the circuits, *cf. United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) and *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992) with *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995), *cert. den.* 519 U.S. 812 (1996), that is not the issue decided by the Seventh Circuit in this case. There is no split in the circuits over the constitutionality of stopping vehicles at checkpoints whose sole purpose is to investigate criminal activity. The circuit courts which have addressed this question all agree, as did the Seventh Circuit in this case, that such stops are violative of the Fourth Amendment. Third, the Seventh Circuit's decision is clearly correct and conforms to settled law from this Court.

A. Given the limited record in this case, plenary review should be denied

The petitioners are seeking plenary review of the Seventh Circuit's reversal of the trial court's determination, in the context of a preliminary injunction ruling, that the respondents could not demonstrate a probability of success on the merits. In ruling for the respondents, the Seventh Circuit did not enter final judgment or even order that a preliminary injunction be entered for the respondents. The Seventh Circuit noted that "[b]ecause it

was decided by the district court on a very skimpy stipulation of facts, our ruling on the legality of the City's program is necessarily tentative." (Pet. App. 2a). The Seventh Circuit further noted that "[w]hether there may be other grounds for denying the preliminary injunction, or whether on a fuller record the Indianapolis program might pass Fourth Amendment muster, are issues for the district court to decide in the first instance." (Pet. App. 12a).

Respondents are confident that they will prevail on the eventual remand of this case to the trial court. However, the above comments by the Seventh Circuit demonstrate there must be a further development of the factual record before plenary review should be considered.

B. The circuit courts which have specifically addressed the question all agree that where the sole purpose of a roadblock is to investigate criminal activity it is unconstitutional if the stop is not supported by probable cause

The traffic checkpoints in this case were designed for one purpose, to look for illegal drug activity. No circuit court has ever upheld such a program, and thus there is no circuit conflict on the core constitutional issue presented by this case.

Prior to the Seventh Circuit's decision in this case, there were three circuit court cases concerning roadblocks which had as their purpose, at least in part, the interdiction of unlawful drugs. In *United States v. Morales-Zamora, supra,* an individual was stopped at a roadblock which

had been ostensibly set up to check licenses and registrations. However, as a matter of fact, the real purpose for the stop was to give drug sniffing dogs the opportunity to sniff the car as the licenses and registrations were being examined. The Tenth Circuit court found that an arrest of an individual who was found to possess drugs after being stopped was unconstitutional. In making this finding the court noted that even "the government agrees that under the Fourth Amendment it could not set up a roadblock for the sole purpose of subjecting all the stopped vehicles to a canine sniff of the exterior of the car." 974 F.2d at 151.

The Sixth Circuit reached a similar conclusion in *United States v. Huguenin, supra,* where law enforcement authorities had set up vehicle checkpoints. In striking down the use of a sobriety checkpoint as a subterfuge to search for illegal drugs, the court explained, "[a]lthough the prevention of drug trafficking is an important government interest, we do not believe it warrants this type of pretext when there in no traffic violation, no probable cause, and not even reasonable suspicion to otherwise stop the vehicle, because the severity of interference with individual liberty is too great." 154 F.3d at 559.

Merrett v. Moore, supra, is not to the contrary. To be sure, the Eleventh Circuit did uphold an arrest made following a roadblock, but only after concluding that the roadblock had as a legitimate purpose both the checking of licenses and registrations as well as exposing vehicles to drug sniffing dogs. The court did not find that a roadblock designed solely to interdict drugs was constitutional and indeed, explicitly left that question open. 58 F.3d at 1551, n. 3.

Here, the Seventh Circuit was faced with the question left open in *Merrett*, is a roadblock designed solely to interdict drugs constitutional? Following the Sixth and Tenth Circuits, the Seventh Circuit's answer to that question was no. Petitioners are unable to point to a single circuit, including the Eleventh Circuit in *Merrett*, which has held otherwise. There is therefore no division in the circuits over this question.

Admittedly, the Missouri Supreme Court, in *State v. Damask*, 936 S.W.2d 565 (Mo. 1996), upheld a roadblock which, like this one, was designed solely to interdict drugs.[2] In upholding the roadblocks the court conceded that "there is apparently no case law that upholds the constitutionality of a checkpoint established solely to interdict drugs." 936 S.W.2d at 572. However, the fact that the Missouri Supreme Court reached a different conclusion than the Seventh Circuit, the Tenth Circuit in *Morales-Zamora* and the Sixth Circuit in *Huguenin*, as well as a number of other courts [*see e.g., Garcia v. State*, 853 S.W.2d 157 (Tex.Ct.App. 1993) and *Galberth v. United States*, 590 A.2d 990 (D.C.App. 1991)], does not demonstrate a division of authority justifying plenary review.

---

[2] In *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), cited by petitioners, the roadblocks had as their primary purpose the interdiction of drugs. However, a legitimate secondary purpose was to conduct vehicle inspections and the court found that the state had "a vital interest in ensuring that the vehicles on its roads are safe for operation, and that licensing requirements are being observed." 474 N.W.2d at 701 This is obviously different from the roadblocks in Indianapolis, which did not have a dual purpose.

C. The Seventh Circuit's decision conforms to the decisions of this Court

The Seventh Circuit's decision in this case conforms to the rule established by this Court that if a search or seizure is for the purposes of criminal investigation it must be supported by probable cause. A search or seizure without probable cause can be justified only if there are special circumstances unrelated to criminal investigation. The decision also conforms to the rule that, although the subjective intent of the police is irrelevant if probable cause for a search or seizure exists, without probable cause a criminal investigatory search is not constitutional. Because the Seventh Circuit's decision is consistent with the decisions of this Court, plenary review should be denied.

The principle of individualized suspicion is central to the Fourth Amendment. This Court has never deviated from the principle that if police are conducting a criminal investigation there must be cause prior to a search or seizure. In *Chandler v. Miller*, 520 U.S. 305, 308 (1997), this Court noted that searches conducted in the absence of reasonable suspicion are exceptional:

> Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in "certain limited circumstances." See *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 . . . (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, *United States v. Martinez-Fuerte* . . . , or at a sobriety checkpoint, *Michigan Dept. of State Police v. Sitz* . . .

Searches in the absence of probable cause can occur, however, when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (internal quotation and citation omitted). However, the exception that the petitioners seek to the general rule requiring probable cause would swallow the rule of individualized suspicion.

In *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), sobriety checkpoints were approved. However, the Court noted that the state's interest was not in investigating criminal activity, but in safeguarding against the immediate danger posed by persons who are drunk and are operating motor vehicles. 496 U.S. at 455. This is a regulatory purpose, not a criminal investigatory one. Thus *Sitz* is clearly distinguishable from this roadblock where the sole purpose is to stop persons long enough to form probable cause to conduct a warrantless search.

Similarly, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), upheld the constitutionality of immigration checkpoints that caused brief detention of vehicles. These were upheld not as criminal investigatory searches, but because of the need to turn back from our border areas "deportable aliens." 428 U.S. at 553. This Court has long recognized the distinction between stopping vehicles without probable cause in the hope of finding evidence of criminal activity and stopping persons "crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in . . . " *Carroll v. United States*,

267 U.S. 132, 153-54 (1925). Immigration checkpoints are "undertaken primarily for administrative rather than prosecutorial purposes." *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973) (Powell, J., concurring).[3]

The distinction, therefore, is between criminal investigatory seizures and searches and those which have another, administrative or regulatory purpose. As noted by the Seventh Circuit, the roadblocks at issue in this case do not further a regulatory purpose:

> Indianapolis makes no attempt to defend its roadblocks on the basis that it is trying to exclude a harmful substance or dangerous persons. Though that may be the ultimate aim, the City concedes that its proximate goal is to catch drug offenders in the hope of incapacitating

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[3] This Court recognizes the constitutional significance between administrative searches, which can occur without specific probable cause, and criminal investigatory searches, which require cause, in other contexts besides traffic checkpoints. Administrative inspections to enforce building codes without specific probable cause were allowed in *Camara v. Municipal Court*, 387 U.S. 523 (1967), where violations of the codes could in fact be criminal but the searches did not have a criminal investigatory purpose.

> Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public heath and safety.

387 U.S. at 531.

> them, and deterring others, by criminal prosecution. The program has no regulatory purpose that might be compared to that of immigration laws, which seek to exclude and deport illegal immigrants rather than just to prosecute them for criminal violations of the immigration laws.

(Pet. App. 10a). This decision, therefore, falls squarely within the prior decisions of this Court establishing a clear distinction between searches and seizures with a regulatory purpose and those with a criminal investigatory purpose. The latter require probable cause. The former may not if they are supported by special needs unrelated to criminal investigation.

Petitioners nevertheless argue that they are allowed to set up a roadblock, which uses traffic safety as a regulatory reason to cause vehicles to stop without probable cause, and then convert the stop into a criminal investigatory search for drugs, even though the overall purpose of the stop from its very inception is a criminal investigatory one. Petitioners argue that the distinction between a regulatory stop and a criminal investigatory one is not appropriate since this Court has held that the government's motive or intent is irrelevant in the Fourth Amendment context. (Petition for Writ of Certiorari at 20-21). While *Whren v. United States*, 517 U.S. 806 (1996), held that an officer's subjective motivations are irrelevant if a traffic stop is otherwise justified under the Fourth Amendment because probable cause exists regardless of the subjective motivations, this Court specifically distinguished cases involving "police intrusion without the probable cause that is its traditional justification" from a search founded on probable cause that is nevertheless

driven by the subjective intent of the officers. 517 U.S. at 817. In other words, intent is irrelevant only if probable cause exists. However, this Court has never authorized a search for criminal investigatory purposes absent probable cause. Indeed, as the Court noted in *Whren*, "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." 517 U.S. at 811-12 (emphasis in original). Subjective intent can not override the lack of probable cause.[4]

This is certainly what this Court has intimated in earlier cases; if a roadblock without cause has as its purpose the investigation of criminal activity, it is unconstitutional since the seizures and searches occasioned by the traffic stops are without cause. For example, in *Texas v. Brown*, 460 U.S. 730 (1983), the Court addressed the question of whether the "plain view" doctrine allowed a search and seizure of evidence which an officer saw while an individual was stopped at a driver's license checkpoint. This Court found that the plain view doctrine did apply and that the Fourth Amendment did not preclude

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[4] In his dissent in the Seventh Circuit, Judge Easterbrook ignores this essential point. Contrary to what Judge Easterbrook contends, the majority does not hold that the constitutionality of a roadblock turns on what the law enforcement officials think. The issue is not one of subjective intent, since the issue of intent is immaterial if there is not probable cause. The majority decision below correctly holds that the constitutionality of a roadblock turns on whether the roadblock exists for criminal investigatory purposes. If so, probable cause must be present.

the seizure. However, then Justice Rehnquist, in his plurality opinion, noted that there was no indication that "the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." 460 U.S. at 743. If the purpose of the roadblock was to uncover evidence of criminal activity, the plain view exception would not have applied since the initial stop would not have been lawful for " 'plain view' provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment." 460 U.S. at 738. Thus, under *Texas v. Brown*, a roadblock which is designed to elicit evidence of a crime, is not a justification for a stop under the Fourth Amendment.[5] *See also, South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (upholding routine inventory search of impounded car that uncovered marijuana absent any suggest that the search "was a pretext concealing an investigatory police motive.")

Thus, the Seventh Circuit's decision is entirely consistent with prior decisions of this Court. By contrast, it is petitioners who are seeking an unwarranted extension of the law that would distort accepted Fourth Amendment

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[5] Petitioners argue that this portion of *Texas v. Brown* is only dicta and has been overruled by *Horton v. California*, 496 U.S. 128 (1990). In *Horton* the Court found that evidence can properly be seized under the plain view exception even if the discovery of the evidence is not inadvertent. The *Horton* Court did nothing to change the opinion expressed by the plurality in *Texas v. Brown* that a lawful seizure cannot occur if the original stop giving rise to the seizure is a mere pretext to try to find evidence in plain view.

jurisprudence. There is no need to expand the well accepted boundaries of the Fourth Amendment and there is no need to change the current calculus, which recognizes that cause must be shown for a criminal investigatory search.

CONCLUSION

Certiorari is not warranted. The limited record in this cause cautions against the granting of plenary review. And, the Seventh Circuit decision conforms to other circuits as well as decisions of this Court. There are no grounds for granting the petition and for the foregoing reasons it should be denied.

Respectfully submitted,

KENNETH J. FALK
Counsel of Record
JACQUELYN E. BOWIE
SEAN C. LEMIEUX
E. PAIGE FREITAG
CHRISTOPHER M. GIBSON
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Counsel for Respondents

Supreme Court, U.S.
FILED
JAN 25 2000
CLERK

No. 99-1030

IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND BART PETERSON, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,

Petitioners,

v.

JAMES EDMOND, JOELL PALMER, ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

A. SCOTT CHINN
CORPORATION COUNSEL
CONSOLIDATED CITY OF INDIANAPOLIS
200 E. Washington Street
Indianapolis, IN 46204
(317) 327-4055

MIGUEL A. ESTRADA
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

6pp

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Rule:

Sup. Ct. R. 10(a) 2

REPLY BRIEF FOR PETITIONERS

The question presented in this case is whether traffic checkpoints at which police officers check drivers' licenses and vehicle registrations, and also look for signs of impairment, must be deemed unreasonable under the Fourth Amendment solely because those roadblocks also are intended to intercept and apprehend motorists who use the public highways to smuggle unlawful narcotics. The Seventh Circuit forthrightly conceded that the lower courts—federal and state—are deeply divided on that question. *See* Pet. App. 2a; *see also id.* at 50a, n.* (Easterbrook, J., concurring in the denial of rehearing en banc) (noting that because "a conflict among the circuits (and state courts) preexisted the panel's opinion * * * [o]nly a higher court can give a definitive answer"). Respondents nonetheless contend that both the majority and dissenting members of the Seventh Circuit panel were mistaken in perceiving a division of authority on the question presented. Respondents also contend that review is unwarranted, because the lower courts ruled only on the issuance of a preliminary injunction and, in respondents' view, "there must be a further development of the factual record before plenary review should be considered." Br. In Opp. at 2-3. Neither contention has merit.

1. Respondents assert that the question in this case is whether the Fourth Amendment permits traffic roadblocks that are intended *solely* to interdict narcotics traffickers, rather than whether it is lawful for authorities to set up a license or sobriety checkpoint that also is used to detect narcotics trafficking. Br. In Opp. 3-5. Respondents, however, *stipulated* below that the officers who conduct the roadblocks must first "ask [each motorist] for [his] license and registration" (Pet. App. 52a, 53a), and that the Indianapolis Police Department's procedures also require officers to examine each stopped motorist "for signs of impairment." *Id.* at 53a. Indeed, as respondents themselves ultimately are forced to concede, that record led the district court to conclude that "a secondary purpose of the

checkpoints is to check driver's licenses and vehicle registrations." Pet. App. 44a.

The Seventh Circuit did not purport to overturn that finding. Nor did that court adopt a different reading of the parties' stipulation. The court instead concluded that the City's program is unlawful because the "primary purpose" of the program is to interdict narcotics, rather than to check drivers' licenses or to identify impaired drivers. Pet. App. 10a-11a. That conclusion and the mode of analysis that produced it unquestionably conflict with the rulings of other lower courts. *See, e.g.*, *Merrett v. Moore*, 58 F.3d 1547, 1550-51 (11th Cir. 1995) (roadblock is consistent with Fourth Amendment if "one lawful purpose" for it is to check drivers' licenses and registrations even if "the chief * * * purpose of the roadblock[] * * * was to intercept drugs").

Although respondents' effort to reframe the question presented is clearly foreclosed by the record, plenary review would be warranted in this case even if respondents were correct in their characterization of the question presented. Respondents "[a]dmit[]" that the Supreme Court of Missouri has upheld, as against Fourth Amendment challenges, traffic roadblocks "designed solely to interdict drugs." Br. In Opp. 5, citing *State v. Damask*, 936 S.W.2d 565 (Mo. 1996). Thus, even on respondents' view of the issue decided by the Seventh Circuit, the decision below plainly warrants further review because it concededly "conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a).

2. Respondents also are wrong to contend that the preliminary injunction record is insufficient to rule on the validity of the City's roadblock program. Neither the district court nor the court of appeals decided the case on any basis peculiar to the preliminary injunction context, such as a balancing of equities or assessing a "likelihood" (as opposed to a certainty) of success on the merits. The district court denied an injunction because it found that the stipulated facts establish that the City's roadblock program

is lawful as a matter of law. Pet. App. 40a ("we hold that the checkpoint procedures are constitutional"). The court of appeals, in turn, reached the opposite conclusion because it concluded, on the same record, that the City's program is unlawful as a matter of law. In so holding, the court of appeals conceded that its conclusion depended entirely on the constitutional rule it elected to apply to the case. Although the court virtually conceded that the City's program would be constitutional if the test for legality were "reasonableness" (Pet. App. 3a), it refused to apply that test because it believed that "courts do not usually assess reasonableness at the program level when they are dealing with searches related to the general criminal law enforcement." *Id.* at 4a. Nothing in that legal conclusion turns on the procedural posture of the case.

Respondents also err in contending that certiorari is unwarranted because the court of appeals suggested that the City's program might "pass Fourth Amendment muster" "on a fuller record." Br. In Opp. at 3. As the petition explained, the Seventh Circuit did *not* hold that it lacked sufficient facts to decide the Fourth Amendment question. Pet. 24-25 n.4. Had the court believed that, it surely would have remanded the case to the district court with instructions to develop the record more fully instead of proceeding, as it did, to rule on the constitutional issue. *Compare United States v. Ramirez-Gonzalez*, 87 F.3d 712, 715-16 (5th Cir. 1996). Indeed, respondents are unable to identify—even now—a *single* specific fact that is both absent from the stipulated record and needed for meaningful review by this Court.

As petitioners have explained, without pertinent rebuttal from respondents, the Seventh Circuit merely left open the possibility that the City might in the future adduce "facts" showing that its drug problem is so grave that the need to stem it is comparable (in some undefined sense) to the urgency created by an imminent terrorist attack. Pet. App. 6a, 12a-13a; *see also* Pet. 24-25 n.4. The Seventh Circuit's willingness to preserve for the City the opportunity

to invoke, in the future, a vague "suicide pact" exception to the Constitution (Pet. App. 6a) scarcely shows that additional factual development is needed on the important question that the Seventh Circuit actually decided.

3. Respondents devote the bulk of their Brief to the proposition that the decision below is correct. Br. In Opp. 6-12. That claim, of course, would not preclude plenary review even if it were true. This Court's duty to review issues on which the lower courts are divided does not operate only when the particular judgment under review might be reversed. But contrary to respondents' assertion, the linchpin of their legal analysis is clearly wrong. Respondents assert that the City is required to show some special need beyond the ordinary needs of law enforcement before police officers may stop vehicles without probable cause. *E.g. id.* at 6-7. But respondents never grapple with the fact that this Court rejected precisely the same argument in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). As the Court noted in *Sitz*, no showing of "special need" is required in "cases dealing with police stops of motorists on public highways." *Id.* at 450. Because the Seventh Circuit departed from that teaching, plenary review is clearly warranted.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

A. SCOTT CHINN
CORPORATION COUNSEL
CONSOLIDATED CITY OF INDIANAPOLIS
200 E. Washington Street
Indianapolis, IN 46204
(317) 327-4055

MIGUEL A. ESTRADA
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

January 25, 2000

Apr 4 2000

(3)

No. 99-1030

Supreme Court, U.S.
FILED
APR 4 - 2000
CLERK

In The Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND STEPHEN GOLDSMITH, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioners,

vs.

JAMES EDMOND, JOELL PALMER, ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF NEITHER PARTY.

(List of Counsel on Inside Front Cover)

22 pp

Of Counsel:

GENE VOEGTLIN, ESQ.
International Association of
Chiefs of Police, Inc.
515 North Washington St.
Alexandria, Virginia 22312

RICHARD WEINTRAUB, ESQ.
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

BERNARD J. FARBER, ESQ.
1126 West Wolfram
Chicago, Illinois 60657-4330

Counsel For Amici Curiae:

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland Ave.
Suite 1008
Chicago, Illinois 60656
E-mail: AELE@aol.com

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tele/Fax (630) 858-6392
E-mail: lelp@xnet.com

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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 17,000 members in 112 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national and state professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the operation of roadblock procedures within the bounds of the law; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of policy on the subject.

Because of the relationship with our members, and

the composition of our membership and directors–including active law enforcement administrators and counsel–we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

The Indianapolis Police Department operated what was called a "checkpoint" program. Motorists were briefly stopped and examined in order to determine whether they were impaired and whether their driving documents were in order. One of the objectives of the checkpoints was to discover narcotics traffickers. This was done by walking a drug detection dog around a stopped car while the motorist's documents were being checked. The Department was interested in driver impairment, regulatory issues, and interrupting the flow of illegal narcotics in the city.

Written procedures were established in advance for the program. The locations of the checkpoints were selected weeks in advance by police supervisors, based on geographical suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which would minimize interference with normal traffic flow. Drivers approaching each of the pre-determined locations were warned, with lighted signs, that they should be prepared to stop for a "narcotics checkpoint" and that a "narcotics K-9" would be in use. Only a pre-determined number of cars approaching a given checkpoint location was stopped. All other traffic was permitted to continue without interruption until the

last of the vehicles initially stopped was processed. Once the last of the initially stopped cars left, a new group of motorists (the same predetermined number) was stopped. The procedure was followed without deviation and with a minimum of discretion by police officers.

Motorists were stopped at the checkpoint and approached by police officers, at least one of whom was in full uniform. Motorists were requested to show their driver's license and motor vehicle registration. Officers looked for any signs of DUI, including alcohol odors, slurred speech, or disorientation. During the time that a motorist's documents were being checked, a drug detection dog was walked around the car. If the motorist's documentation proved to be in order, and there was no cause for any further detention (such as signs of driving impairment, a positive dog "alert," or the discovery of outstanding warrants), the motorist was allowed to proceed without delay. The checkpoints were operated in a manner to ensure that no motorist was stopped for more than five minutes, unless grounds for a longer detention were discovered during the stop, with the average stop lasting only two to three minutes.

Six of these roadblocks were conducted in accordance with the program during a four month period. Under the program 1,161 vehicles were stopped and 104 motorists were arrested—an effectiveness rate of 9%. The arrests were divided approximately equally between narcotics offenses (55 arrests) and other crimes (49 arrests).

The Seventh Circuit Court of Appeals, *Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999), ruled that the

roadblock program violated the Fourth Amendment. The court was not persuaded by the arrest rates of 5% for drugs and 9% overall, because the city had as one of its purposes to interdict drug offenders in the hope of incapacitating them and deterring others, as well as checking for driver impairment and traffic and vehicle related violations. Judge Easterbrook dissented in a separate opinion.

SUMMARY OF ARGUMENT

Amici take the position that the Court should approve multipurpose roadblock programs similar to that utilized by the city of Indianapolis in this case. Our position is that such programs are permissible under the Fourth Amendment.

We take this position on the basis that precedents of the Court have established that one of the purposes of a constitutional roadblock can be enforcement of the criminal laws. We also note that the Court has repeatedly held that the proper inquiry in Fourth Amendment cases is one of objective analysis, rather than subjective analysis.

Even though there is conflict in the lower courts on this issue, the better-reasoned cases on the subject approving such roadblock programs are firmly supported by this Court's precedents. We also submit that the public interest in dealing with the serious problem of illegal drugs in our communities and the threat to traffic safety posed by drugged drivers indicates the need for a multilevel approach to law enforcement efforts.

Roadblock programs are an effective tool for dealing with the problem, as indicated by the Indianapolis program.

As police administrators and related officials, *amici* point to the need for a clear statement from the Court on the propriety of such programs, so that uniform and consistent policies and rules can be adopted and implemented by law enforcement agencies. This need is underscored by the existence of the aforementioned conflict on the legal issues in the lower courts.

ARGUMENT

THIS COURT SHOULD RULE THAT MULTI-PURPOSE ROADBLOCKS SUCH AS THOSE UTILIZED BY THE CITY OF INDIANAPOLIS IN THIS CASE DO NOT VIOLATE THE FOURTH AMENDMENT.

A. THIS COURT'S CASES PERMIT A ROAD-BLOCK PROGRAM WHERE ONE OF ITS PURPOSES IS ENFORCEMENT OF THE CRIMINAL LAWS.

As dissenting Judge Easterbrook in the case below said, "This is a roadblock case. To figure out how to handle a roadblock . . . case, we must look at how the Supreme Court has handled other roadblock cases." 183 F.3d at 669.

This Court approved a roadblock to search for alien smuggling in *United States v. Martinez-Fuerte*, 428 U.S.

543, 555 (1976). Alien smuggling is a violation of the criminal law. The Court noted that the "practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Martinez-Fuerte*, 428 U.S. at 560-61 n.14. It then focused on "[t]he regularized manner in which established checkpoints [were] operated," and the "visible evidence, reassuring to law-abiding motorists, that the stops [were] duly authorized and believed to serve the public interest." It concluded that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by a warrant." *Id.* at 559, 566.

While many more cases leading from *Martinez-Fuerte* to the present could be cited on this point, the one case from this Court most analogous to the instant case is *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). *Sitz* involved a roadblock program designed to regulate traffic safety and identify and arrest drunk drivers. DUI and its related offenses are violations of the criminal law.

Significantly as to *Sitz*, the court below rejected its application to the roadblock involved in the instant case, concluding that this Court's cases foreclose a roadblock intended to enforce criminal laws, and that this Court has required a "special need" based on concerns *other than crime detection* before dispensing with a requirement of individualized suspicion. In point of fact, this rationale was flatly rejected by this Court in *Sitz*. *Sitz* unequivocally stated that no such "special needs" must be shown in "cases dealing with police stops of motorists

on public highways." 496 U.S. at 450.

As noted, the roadblock program in *Sitz* involved both a regulatory aspect (traffic safety on the highways) and a *criminal aspect* (DUI and related criminal offenses). This Court did not say that the fact that the police were interested in enforcing the criminal laws of the state of Michigan violated the reasonableness requirement of the Fourth Amendment as it pertains to roadblocks. There is no conceptual or operational difference between *Sitz* and the instant case.

As indicated in the Statement of Facts, the police in this case operated a roadblock program, *inter alia*, to inspect automobile regulatory documents and to determine impairment of drivers. They were also interested in discovering narcotics, an element that relates to both impairment and an independent criminal offense. Indeed, it is fair to infer that the police would have made an arrest for *any* traffic-related or non-traffic-related criminal offense properly discovered during the procedure.

As part of the operation, a drug detection dog walked around stopped cars. The use of the dog did not add to the length of time a car was stopped. The use of the dog was not a "search." Its alert would establish probable cause for the existence of narcotics, a criminal offense. *United States v. Place*, 462 U.S. 696 (1983).

Sitz, thus, should have been sufficient authority to approve the roadblock in the court below. The fact that it was not sufficient for the court below indicates a fundamental misunderstanding by that court of the

roadblock jurisprudence of this Court starting with *Martinez-Fuerte* and culminating in *Sitz*. It also demonstrates a fundamental misunderstanding of the principles of law established by this Court as discussed in Section B.

B. THIS COURT HAS REPEATEDLY HELD THAT THE PROPER INQUIRY IN FOURTH AMENDMENT JURISPRUDENCE IS AN "OBJECTIVE" RATHER THAN "SUBJECTIVE" DETERMINATION.

The decision of the court below is based on concepts of Fourth Amendment jurisprudence long since discarded by most courts, never embraced by this Court, and recently flatly rejected by this Court in the context of automobile stops.

In case after case, this Court has held that the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officer's state of mind at the time the challenged action was taken. *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). This "objective test' has been applied in a variety of Fourth Amendment contexts. See, *e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996) (rejecting the concept of pretextual traffic stops and the use of a subjective test in the Fourth Amendment context); *Horton v. California*, 496 U.S. 128, 137-38 (1990) ("plain view" seizures); *Graham v. Connor*, 490 U.S. 386, 397-99 (1989) (force necessary to effect an arrest);

United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (allegedly "pretextual" boarding of vessel).

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court upheld suspicionless bus sweeps by police officers, a new and increasingly useful tool in the effort to stem narcotics trafficking. The Court adopted a "totality of the circumstances" standard, an essential part of the objective test as later articulated in *Whren* for traffic stops. *Amicus* AELE filed a friend of the court brief in *Bostick* supporting the type of stops involved in that case, stops which bear a relationship to roadblocks in their absence of individualized suspicion.

C. ALTHOUGH THE LOWER COURTS ARE DIVIDED ON THE ISSUE, THE POSITION APPROVING SUCH ROADBLOCK PROGRAMS IS WELL-SUPPORTED BY THIS COURT'S PRIOR DECISIONS.

While the cases are split on the issue of multipurpose roadblocks, *amici* submit that the better-reasoned view utilizing the objective analysis adopted by this Court supports such programs. The leading case is *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995). In *Merrett* the Eleventh Circuit Court of Appeals upheld a Florida program that is indistinguishable from that adopted by the city of Indianapolis.

Florida law enforcement officials in *Merrett* put into place a roadblock program that concededly was intended to intercept narcotics traffickers. The checkpoints were clearly marked with traffic control devices (such as traffic cones or flashing lights) and

warning signs. Officers stopped passing traffic, checked for safety defects, and examined each driver's license and registration. Stopped vehicles were sniffed by a narcotics dog while the driver's documentation was being checked, and "most people experienced only a slight delay" in the process. 58 F.3d at 1540.

In approving the program, the court also rejected the argument that "the operation was an invalid pretextual seizure" because "Florida conducted the roadblock operation at issue for the purpose of exposing the cars to the drug sniffing dogs." *Id.* at 1550. The court, in effect, rejected the pretextual argument rejected by this Court one year later in *Whren*.

The *Merrett* court "adopt[ed] a totally objective rule: a state may conduct a mixed-motive roadblock as long as one purpose presented for the roadblock could validly justify the roadblock, *even if no roadblock would have been put in place but for the state's desire to hunt for unlawful drugs.*" *Id.* at 1551 (emphasis added). Since the license and registration roadblocks themselves were constitutional, the court further rejected the proposition that the use of a narcotics dog "without an individualized reasonable suspicion of drug-related criminal activity amounted to an unconstitutional search." 58 F.3d at 1553, citing *United States v. Place*, 462 U.S. 696 (1983). It said that "[s]o long as the use of the dogs did not make the delay caused by the roadblocks unreasonable . . . the state's decision to use dogs at the roadblocks does not make the operation unconstitutional." 58 F.3d at 1553.

Amici submit that while the courts are split on the issue, an application of this Court's objective analysis

approach to Fourth Amendment issues and its clear rejection of the "pretextual" issue, point in one direction: approval of the type of roadblock program utilized in the instant case.

D. THE PUBLIC INTEREST IN DEALING WITH THE ENORMOUS PROBLEM OF DRUGS IN OUR URBAN AREAS PROVIDES SOUND POLICY FOR APPROVING THE TYPE OF ROADBLOCK PROGRAM INVOLVED IN THIS CASE.

It is beyond dispute that the problems of driving while impaired by alcohol or other drugs is a major concern for our communities. The roadblock program utilized by Indianapolis in this case addresses that problem in a way fully approved by this Court in *Sitz*.

It is likewise beyond dispute that the interest of communities such as Indianapolis in detecting the transportation of narcotics on the highways is compelling. As noted by this Court eleven years ago in *NTEU v. Von Raab*, 489 U.S. 656, 668 (1989), drug trafficking is "one of the greatest problems affecting the health and welfare of our population." The Court said then that the problem had become a "veritable national crisis in law enforcement." *Ibid.*, quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). If anything, the problem has grown, not receded, since the Court made this prophetic statement.

Amici know from our personal experience as police administrators that the existence of drug trafficking—even to the point of well-known "drug bazaars," open air drug markets in our cities where drug peddlers drive into

neighborhoods and openly set up shop to sell drugs from their cars, and the sale of drugs in our schools—is a problem no less important than that of traffic law enforcement and impaired driving. We speak from experience in informing the Court that multipurpose roadblock programs can make a substantial contribution to addressing all of these problems. That such programs can do this without infringing on the rights of our law-abiding citizens is established by the precedents of this Court. The "balancing of interests" approach adopted by this Court for checkpoint stops in *Texas v. Brown*, 460 U.S. 730 (1983), should seal the fate of such programs in the constellation of legitimate constitutional concerns.

E. IN VIEW OF THE CONFLICT IN THE FEDERAL AND STATE COURTS, POLICE ADMINISTRATORS AND ADVISORS ARE IN NEED OF A CLEAR STATEMENT FROM THE COURT ON THE PROPRIETY OF SUCH PROGRAMS SO THAT UNIFORM AND CONSISTENT POLICIES AND RULES CAN BE ADOPTED AND IMPLEMENTED.

Amici endorse the balancing of interests test of *Brown*, the objective analysis approach of *Graham v. Connor, Whren, Sitz*, and other cases, and the rejection of the secondary purpose issue disposed of in *Whren*. We are concerned, however, about the division of authority on the topic of roadblock programs in our lower courts.

The Court's resolution of the issues in this case will, hopefully, give clear guidance for policy development and implementation. Our concern with policy, however, goes beyond that of designing and

implementing rules of conduct. Our larger policy responsibility includes effective law enforcement for our communities. We see first-hand the devastating effect of drugs in our communities. Many of our communities are badly injured by rampant drug usage. We need weapons that comport with constitutional protections to deal with the problem of drug trafficking, drug bazaars, open air drug markets, crack houses, and the like. From a community policy and planning perspective, this problem is as great, if not greater, than that of traffic and safety regulation and DUI drivers. Law enforcement administrators need the kind of roadblock programs utilized in this case in order to meet community safety needs that result from illegal drugs.

The Court has been responsive to these and related problems in *Texas v. Brown*, *Florida v. Bostick*, *Sitz*, *Whren*, and other cases. The constitutional basis for roadblock programs such as that utilized in Indianapolis is not novel. The results of the Indianapolis program are outstanding (an overall effectiveness rate of 9%).

We echo the words of Judge Easterbrook in the dissent below, that there are many ways to approach drug law enforcement—among them the use of informers, infiltrators, forceful searches with warrants, etc. Unless the police abandon "high crime areas" as not policeable, they must consider traditional enforcement techniques. Should officers recruit more students and gang members to inform on each other? Should the police encourage neighbors to denounce each other, a technique employed by totalitarian governments?

The Indianapolis program, we suggest, is

reasonable, proportioned and effective. Its importance for highway safety as well as drug enforcement cannot be doubted. In a 1990-91 National Highway Traffic Safety Administration (NHTSA) study of 1,882 fatally injured drivers from seven states, alcohol was found in 51.5% of the drivers, and other drugs were found in 17.8% of the drivers. Studies of drivers injured in crashes or cited for traffic violations also show that many of those drivers have used drugs. In an ongoing NHTSA study of non-fatally injured drivers in Rochester, New York, 12% of all drivers tested positive for drugs other than alcohol (43 of 360 cases), and 23.5% of drivers less than 21 years old tested positive for drugs other than alcohol (4 of 17 cases). Studies of drivers taken for medical treatment have shown positive drug rates ranging from below 10% to as high as 30 to 40%. Studies of drug incidence among drivers arrested for motor vehicle offenses have found drugs in 15 to 50% of drivers.

In another study by NHTSA, literature published from 1980 through 1985 was reviewed to update a previous "state of knowledge" report produced in 1980. The project found that drugs other than alcohol are detected in 10 to 22% of accident-involved drivers, and that drugs alone (i.e., without alcohol) are found in 3 to 15% of accident-involved drivers. It was also found that the majority of drug-using drivers have high levels of alcohol in combination with the drugs. National Highway Traffic Safety Administration, Office of Program Development and Evaluation, *Compendium of Traffic Safety Research Projects 1985-1995*.

In the absence of constitutional impediment, the Indianapolis program is an approach that our

communities should be allowed, as a matter of local government policy-making, to choose for themselves. An application of this Court's established precedents to the facts of this case will make that choice available for local government.

CONCLUSION

Amici urge this Court to uphold the constitutionality of the roadblock program involved in this case on the basis of its precedents and sound judicial policy.

Respectfully submitted,

Of Counsel:

GENE VOEGTLIN, ESQ.
International Association of Chiefs of Police, Inc.
515 North Washington St.
Alexandria, Virginia 22312

RICHARD WEINTRAUB, ESQ.
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

BERNARD J. FARBER, ESQ.
1126 West Wolfram
Chicago, Illinois 60657-4330

Counsel for Amici Curiae:

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective Law Enforcement, Inc.
5519 N. Cumberland Ave.
Suite 1008
Chicago, Illinois 60656
E-mail: AELE@aol.com

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tele/Fax (630) 858-6392
E-mail: lelp@xnet.com

(12)

(14)

No. 99-1030

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND BART PETERSON, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioners,

v.

JAMES EDMOND AND JOELL PALMER, ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

A. SCOTT CHINN
CORPORATION COUNSEL FOR THE CONSOLIDATED CITY OF INDIANAPOLIS
Counsel of Record
ANTHONY W. OVERHOLT
OFFICE OF CORPORATION COUNSEL
Suite 1601, City-County Building
200 E. Washington Street
Indianapolis, Indiana 46204
(317) 327-4055

MATTHEW R. GUTWEIN
THOMAS M. FISHER
APRIL E. SELLERS
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Petitioners

KENNETH J. FALK
Counsel of Record
JACQUELYN E. BOWIE
SEAN C. LEMIEUX
E. PAIGE FREITAG
CHRISTOPHER M. GIBSON
INDIANA CIVIL LIBERTIES UNION
1031 E. Washington Street
Indianapolis, Indiana 46202
(317) 635-4059

Counsel for Respondents

PETITION FOR CERTIORARI FILED 12/15/99
CERTIORARI GRANTED 2/22/00

22pp

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

No. IP98-C-1400-B/S

JAMES EDMOND AND JOELL PALMER,
on their own behalf and on behalf of a class of
those similarly situated,

Plaintiffs,

v.

STEPHEN GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana, INDIANAPOLIS, INDIANA, and UNKNOWN MEMBERS OF THE INDIANAPOLIS POLICE DEPARTMENT,

Defendants.

DOCKET ENTRIES

DATED	PROCEEDINGS
10/14/98	COMPLAINT (Class Action) for Declaratory and Injunctive Relief * * *
	* * *
10/20/98	MOTION FOR PRELIM INJ (Verified) * * *
10/20/98	MEMORANDUM in support of Motion for Preliminary Injunction * * *
11/04/98	RESPONSE to pltf's Memorandum in support of Motion for Preliminary Injunction * * *
11/04/98	AFFIDAVIT of Marshall Depew * * *
	* * *
11/09/98	STIPULATION of the Parties regarding factual issues - JOINT Parties * * *

DATE	PROCEEDINGS
11/09/98	STIPULATION to Certify Cause as a Class Action - JOINT Parties * * *
11/09/98	REPLY MEMORANDUM in support of Motion for Preliminary Injunction * * *
11/18/98	ENTRY GRANTS Pltfs' Motion for Class Certification * * *
11/18/98	ENTRY DENIES Pltfs' Motion for Preliminary Injunction * * *
11/18/98	ENTRY DENIES Pltfs' claim under the Indiana Constitution based on their failure to establish a likelihood of success on its merits * * *
	* * *
12/03/98	NOTICE OF APPEAL from Entry of 11/18/98, denying PLTF's motion for Preliminary Injunction * * *
	* * *
12/09/98	MOTION TO STAY proceedings pending Appeal and to suspend Case Management Deadlines - JOINT Parties * * *
	* * *
12/10/98	ORDER GRANTS parties Joint Motion to suspend the Case management Deadlines and to Stay Proceedings Pending Appeal * * *
	* * *
08/30/99	MANDATE RECEIVED FROM CA. The judgment of the District Court is REVERSED, with costs, in accordance with the decision of the CA entered 7/07/99. Received certified copy of opinion and judgment. Record returned consisting of 1 vol pleadings. * * *
	* * *

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-4124

JAMES EDMOND AND JOELL PALMER,
on their own behalf and on behalf of a class of
those similarly situated,
Plaintiffs-Appellants,

v.

STEPHEN GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana, INDIANAPOLIS, INDIANA, and UNKNOWN MEMBERS OF THE INDIANAPOLIS POLICE DEPARTMENT,
Defendants-Appellees.

DOCKET ENTRIES

DATE	PROCEEDINGS
12/8/98	Private civil case docketed. Transcript information sheet due 12/18/98. Appellant's brief due 1/19/99 for James Edmond, for Joell Palmer. * * *
12/8/98	Filed Appellant James Edmond, Appellant Joell Palmer docketing statement.* * *
	* * *
3/19/99	Original record on appeal filed. Contents of record: 1 vol. pleadings. * * *
4/12/99	Case heard and taken under advisement by panel: Chief Judge Richard A. Posner, Circuit Judge Frank H. Easterbrook, Circuit Judge Diane P. Wood. * * *
	* * *

DATE	PROCEEDINGS
7/7/99	Filed opinion of the court by Chief Judge Posner. REVERSED. Chief Judge Richard A. Posner, Circuit Judge Frank H. Easterbrook, dissenting, Circuit Judge Diane P. Wood. * * *
7/7/99	ORDER: Final judgment filed per opinion. With costs: y. * * *
7/21/99	Filed 30c Petition for Rehearing with Suggestion for Rehearing Enbanc by Appellees Stephen Goldsmith, Indianapolis, IN and Unknown Members Indi. Dist. * * *
	* * *
8/18/99	ORDER: On July 21, 1999, defendants-appellees filed a petition for rehearing with suggestion for rehearing en banc and on August 3, 1999, plaintiffs-appellants filed an answer. All the judges on the original panel have voted to deny (*) the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED. (*)Statement of Easterbrook, Circuit Judge, respecting the denial of rehearing en banc. The question presented by this case is an important and recurring one, but I have not called for a vote on the petition for rehearing en banc. The court's opinion shows that a conflict among the circuits (and state courts) preexisted the panel's opinion, and it would be pointless to sit en banc just to consider moving from one side of that conflict to another. Only a higher court can give a definitive answer. * * *
	* * *

DATE	PROCEEDINGS
11/4/99	Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 12/16/99. * * *
12/22/99	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 99-1030. * * *
2/25/00	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 99-1030. * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP98-C-1400-B/S

JAMES EDMOND and JOELL PALMER,
on their own behalf and on behalf of a class of
those similarly situated,
Plaintiffs,

v.

STEPHEN GOLDSMITH, in his official capacity
as Mayor of the City of Indianapolis, Indiana,
INDIANAPOLIS, INDIANA, and UNKNOWN
MEMBERS OF THE INDIANAPOLIS POLICE DEPARTMENT,
Defendants

COMPLAINT—CLASS ACTION
JURY TRIAL REQUESTED

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF/INDIVIDUAL COMPLAINT FOR DAMAGES FOR NAMED PLAINTIFFS

Introduction

1. This is a class action complaint for injunctive and declaratory relief challenging the defendants' continuing practice of using vehicle roadblocks in order to intercept unlawful drugs. The practice violates both the Indiana and the United States Constitutions. The two named plaintiffs

also request individual damages for the unlawful searches to which they were subjected.

Jurisdiction and Venue

2. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1331 since it arises under the Constitution of the United States. This Court has jurisdiction of plaintiffs claims arising under Indiana law pursuant to 28 U.S.C. § 1367 since the state law claims are so related to the federal law claims that the form part of the same case or controversy under Article III of the United States Constitution.

3. This Court has jurisdiction to enter declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

5. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the United States Constitution.

Parties

6. James Edmond and Joell Palmer are both adult residents of Marion County, Indiana.

7. Stephen Goldsmith is the duly elected Mayor of the City of Indianapolis, Indiana.

8. The City of Indianapolis, Indiana is a municipal corporation and is Indiana's largest city and is its capital.

9. Unknown Members of the Indianapolis Police Department are the as of yet unknown police employees who were personally involved in the violation of the named plaintiffs rights.

Class Action Allegations

10. Plaintiffs seek to bring this action on their own behalf and on behalf of a class of those similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

11. The class is defined as:

> all persons traveling in automobiles through the areas of Indianapolis which are within the jurisdiction of the Indianapolis Police Department and who are therefore subject to the announced policy of the City of Indianapolis of operating random vehicle roadblocks in an attempt to interdict and curtail unlawful drugs and unlawful drug use.

12. The class meets all the requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

a. Although the exact size of the class is unknown, more than 1,000 persons have been stopped in the roadblocks already and the City of Indianapolis has announced that it intends to continue the roadblocks for the foreseeable future. The class is therefore so numerous that joinder of all members is impracticable and the numerosity requirement of Rule 23(a)(1) is met.

b. There are common questions of law or fact as required by Rule 23(a)(2), namely whether the defendants' traffic roadblock practice and policy is constitutional.

c. The claims of the representative parties are typical of those of the class as required by Rule 23(a)(3).

d. The representative parties are adequate class representatives as required by Rule 23(a)(4).

13. The further requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure are met here in that at all times the

defendants have acted and have failed to act in ways generally applicable to the class as a whole, thereby making appropriate both final injunctive and declaratory relief.

Factual Allegations

14. In order to combat what it perceives as a problem with trafficking and possession of unlawful drugs defendant Goldsmith and the City of Indianapolis have embarked on a program of traffic vehicle roadblocks where vehicles traveling on interstate exits in areas of Indianapolis are stopped.

15. The roadblocks are not publicized. Instead signs are erected on Indianapolis interstates specifying that there will be a traffic roadblock a short distance ahead.

16. However, there are not roadblocks placed on the interstate. Instead, roadblocks are placed at the base of the interstate exit which follows the signs announcing the roadblock. Defendants have specified that this is designed to "catch" motorists who leave the highway to avoid what they believe is an impending stop.

17. The roadblocks are generally nor visible from the highway.

18. Upon exiting some, but not all, vehicles are forced to pass through roadblocks.

19. Vehicles selected to pass through the roadblocks may not avoid the roadblock and are not free to leave until the process is concluded.

20. In the past, there have often been more than 30 police cars at the roadblocks along with operations vehicles, tow trucks and paddy wagons.

21. The roadblocks have caused long delays in traffic and some persons who have participated in the check points have

had to wait at least 15-20 minutes before they were allowed to resume their travel.

22. The vast majority of the individuals who are stopped by the roadblocks have not committed and are not committing any offenses and they are eventually allowed to leave the roadblock since it uncovers no reasonable suspicion of criminal activity. However, not all of these individuals stopped in the roadblocks are treated in the same manner. Among the many individuals who are detained at the roadblocks and for whom no criminal behavior is uncovered some are asked by members of the Indianapolis Police Department to show them their licenses and registration. These are taken away and checked and while they are being checked one of a number of drug detection dogs may sniff the outside of the individuals' car. Some individuals who are stopped have one of the dogs sniff their car even though officers do not check their license and registration. Some individuals are immediately asked to leave their cars even though there exists no reasonable suspicion or other cause to believe that any unlawful activity has or is taking place. Once the individuals leave their cars either officers or one of the dogs, or both, search their cars even though there is absolutely no reasonable suspicion to conduct such a search. Other individuals have their persons searched even though there is no reasonable suspicion to conduct such a search. When these searches fail to turn up any evidence of criminal behavior these persons are allowed to leave. Other individuals are interrogated as to the reason for their being in the location of the roadblock.

23. Defendant Goldsmith and the City of Indianapolis have indicated that it is their intention to continue these traffic roadblocks and stops for the foreseeable future.

24. On, or about, September 29, 1998, plaintiff James Edmond exited the ramp off of Interstate 65 in Indianapolis

onto Morris and Prospect streets when he saw flashing lights and approximately 30 police cars pulling over cars. He had not seen any signs concerning the roadblock before he exited.

25. An individual in street clothes with a badge around his neck, believed to be an Unknown Indianapolis Police Department Officer, motioned and told him to stop on the exit ramp.

26. The officer immediately began to ask Mr. Edmond questions such as: why did he exit at that particular exit and where he was coming from.

27. The officer also indicated that this was a canine search and asked for Mr. Edmond's license and registration. These were taken away. He also asked if Mr. Edmond had a gun which Mr. Edmond did since he is licensed to carry a concealed weapon and that license was in his wallet.

28. The officer took the gun from Mr. Edmond and told him to get out of his car. Mr. Edmond left the car.

29. Other Unknown Indianapolis Police Officers opened the passenger rear and front doors and a dog, directed by one of the Unknown Police Officers, entered his car.

30. After the dog spent some time in his car the unknown Indianapolis Police Officer controlling the dog said "Nothing", and took the dog away.

31. Nevertheless, Mr. Edmond was not allowed to enter his car and leave. Instead, another Unknown Indianapolis Police Department officer entered his car and opened and search a zipped up CD case which was on the floor board of his rear seats. He also opened up a box of cassette cases which was located in the rear of his car as well. Upon finding nothing the officer proceeded to look under the seats of his car. He found a flashlight that Mr. Edmond owns, unscrewed it and dumped out the batteries. Another Unknown Indianapolis

Police Department officer returned and handed Mr. Edmond back his license and registration and told him that he was clean and could be let go.

32. An Unknown Indianapolis Police Department officer then returned Mr. Edmond his gun to him. He did, however, retain, the bullet that was in the gun when it was seized.

33. At no time had Mr. Edmond committed any criminal activity. Nor was their at any time any reasonable suspicion, much less probable cause, for the inside of his car to be searched.

34. Mr. Edmond's detention at the roadblock took approximately 15-20 minutes.

35. On approximately September 28 or 29, 1998, Joell Palmer was traveling on Interstate 65 in Indianapolis and exited on the ramp leading to Prospect and East streets.

36. There were approximately 35 Indianapolis Police Department Officers on the ramp and he was pulled over.

37. An Unknown Indianapolis Police Department officer approached his car ans said that the police were going to search his car. He was told to leave his car.

38. Although an Unknown Indianapolis Police Department Officer took Mr. Palmer's registration and license, the police informed him his car was going to be searched even before his license and registration was taken.

39. Mr. Palmer informed the Unknown Members of the Indianapolis Police Department that he was not waiving his 4th Amendment rights.

40. An Unknown Member of the Indianapolis Police Department started to pat Mr. Palmer down and put his hand in his left front pocket of his pants. There was nothing there but keys and the officer did not remove anything from Mr. Palmer's person. Mr. Palmer again stated that he had not

waived his rights and the police officer informed him that he had no rights.

41. At that point the police officers brought a dog to his car and let the dog put its front paws in the back of the car and its head in the front of the car, even though at no point while the dog was outside of the car did the dog give any indication that drugs had been detected.

42. An Unknown Member of the Indianapolis Police Department then reached into Mr. Palmer's car and removed campaign literature which he had on his back seat. The officer went through the literature.

43. Mr. Palmer then had his license and registration returned to him by an officer and he was allowed to leave.

44. Mr. Palmer was detained for 5 to 10 minutes.

45. At no time had Mr. Palmer committed any criminal activity. Nor was their at any time any reasonable suspicion, much less probable cause, for the inside of his car to be searched or for the police to perform a pat down search of his person.

46. Both Mr. Edmond and Mr. Palmer regularly travel the interstate and other streets through Indianapolis and are therefore both subject to further stops by the defendants at the roadblocks. They are both extremely concerned about the potential for future stops inasmuch as they both strongly believe that the roadblocks violate their constitutional rights.

47. At all times defendants actions were taken under color of state law.

48. The actions of the defendants are causing plaintiffs and the putative class irreparable harm for which there is no adequate remedy at law.

Jury trial demand

49. Plaintiffs request a trial by jury for all claims so triable.

Legal claims

50. The random vehicle roadblocks that plaintiffs and the class have been, are being, and will be, subjected to represent unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution as made applicable to defendants by the Fourteenth Amendment to the United States Constitution.

51. The random vehicle roadblocks that plaintiffs and the class have been, are being, and will be subjected to represent unreasonable searches and seizures in violation of Article 1 § 11 of the Indiana Constitution.

Request for relief

WHEREFORE, plaintiffs request that this Court:

1. Accept jurisdiction of this cause and set it for hearing at the earliest opportunity.

2. Certify this case as a class action with the class as certified as specified above.

3. Enter a declaratory judgment that defendants policy and practice of random vehicle roadblocks violates both the Fourth Amendment to the United States Constitution and Article 1 § 11 of the Indiana Constitution.

4. Enter a preliminary injunction, later to be made permanent, preventing defendants from continuing their practice and policy of conducting the random vehicle roadblocks.

5. Award the named plaintiffs their individual damages to compensate them for their unlawful searches and seizures.

6. Award plaintiffs their costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

7. Award plaintiffs all other proper relief.

/s/ illegible
Kenneth J. Falk
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Attorney for Plaintiffs

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

AFFIDAVIT OF JAMES EDMOND

Comes now James Edmond, being duly sworn upon his oath, and says that:

1. On, or about, September 29, 1998, I exited the ramp off of Interstate 65 in Indianapolis onto Morris and Prospect streets when I saw flashing lights and approximately 30 police cars. I saw police officers who were engaged in pulling over cars. Prior to exiting I had not seen any signs warning me about an impending roadblock.

2. An individual in street clothes with a badge around his neck, believed to be an Unknown Indianapolis Police Department Officer, motioned me and told me to stop on the exit ramp.

3. The officer immediately began to ask me questions such as: why did I exit at that particular exit and where was I coming from.

4. The officer also indicated that this was a canine search and asked for my license and registration. These were taken away. He also asked me if I had a gun which I did since I am licensed to carry a concealed weapon and that license was in my wallet.

5. The officer took the gun from me and told me to get out of my car. I left the car.

6. Other Unknown Indianapolis Police Officers opened the passenger rear and front doors and a dog, directed by one of the Unknown Police Officers, entered my car.

7. After the dog spent some time in my car the unknown Indianapolis Police Officer controlling the dog said "Nothing", and took the dog away.

8. Nevertheless, I was not allowed to enter my car and leave. Instead, another Unknown Indianapolis Police Department officer entered my car and opened and search a zipped up CD case which was on the floor board of my rear seats. He also opened up a box of cassette cases which was located in the rear of his car as well. Upon finding nothing the officer proceeded to look under the seats of his car. He found a flashlight that I own, unscrewed it and dumped out the batteries. Another Unknown Indianapolis Police Department officer returned and handed me my license and registration and told me that I was clean and could be let go.

9. An Unknown Indianapolis Police Department officer then returned me my gun. He did, however, retain, the bullet that was in the gun when it was seized.

10. At no time had I committed any criminal activity. Nor was their at any time any reasonable suspicion, much less probable cause, for the inside of my car to be searched or for the officers to demand to know why I was in the neighborhood or similar information.

11. My detention at the roadblock took approximately 15-20 minutes.

12. I regularly travel the interstate highways and the streets of Indianapolis.

13. I am extremely concerned that I may be stopped again in a roadblock since I believe that the roadblocks violate my constitutional rights.

VERIFICATION

I hereby verify under penalty of perjury that the foregoing is true and correct.

Executed on 10-12-98.

Prepared by: /s/ James E. Edmond

Kenneth J. Falk
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

AFFIDAVIT OF JOELL PALMER

Comes now Joell Palmer, being duly sworn upon his oath, and says that:

1. On approximately September 28 or 29, 1998, I was traveling on Interstate 65 in Indianapolis and exited on the ramp leading to Prospect and East streets.

2. There were approximately 35 Indianapolis Police Department Officers on the ramp and I was pulled over by an Unknown Indianapolis Police Department Officer.

3. An Unknown Indianapolis Police Department officer approached my car and said that the police were going to search his car. I was told to exit my car.

4. Although an Unknown Indianapolis Police Department Officer took my registration and license, the police informed me that my car was going to be searched even before my license and registration was taken.

5. I informed the Unknown Members of the Indianapolis Police Department that I was not waiving my 4th Amendment rights.

6. I was told to put my hands on the back of my car and an Unknown Member of the Indianapolis Police Department started to pat me down and put his hand in the left front pocket of my pants. There was nothing there but keys and the officer did not remove anything from my person. I again stated that I had not waived my rights and the police officer informed me that I had no rights.

7. At that point the police officers brought a dog to my car and opened my car up and let the dog put its front paws in the back of the car and the dog stuck its head into the front of my car, even though at no point while the dog was outside of the car did the dog give any indication that drugs had been detected.

8. An Unknown Member of the Indianapolis Police Department then reached into my car and removed campaign literature which I had on my back seat. The officer went through the literature.

9. I then had my license and registration returned to me by an officer and I was allowed to leave.

10. I was detained for 5 to 10 minutes.

11. At no time had I committed any criminal activity. Nor was their at any time any reasonable suspicion, much less probable cause, for the inside of my car to be searched or for the police to perform a pat down search of my person.

12. I regularly travel the interstate highways and the streets of Indianapolis. I remain quite concerned that I will be pulled over again and subjected to another unlawful search at a roadblock.

VERIFICATION

I hereby verify under penalty of perjury that the foregoing is true and correct.

Executed on 10/12/98.

Prepared by: /s/ illegible

Kenneth J. Falk
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

(4)

No. 99-1030

IN THE
Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND
BART PETERSON, IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioners,

v.

JAMES EDMOND AND JOELL PALMER,
ON THEIR OWN BEHALF AND ON BEHALF OF
A CLASS OF THOSE SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

A. SCOTT CHINN
CORPORATION COUNSEL FOR THE
CITY OF INDIANAPOLIS
Counsel of Record
ANTHONY W. OVERHOLT
OFFICE OF CORPORATION COUNSEL
Suite 1601, City-County Building
200 East Washington Street
Indianapolis, Indiana 46204
(317) 327-4055

MATTHEW R. GUTWEIN
THOMAS M. FISHER
APRIL E. SELLERS
BAKER & DANIELS
300 North Meridian
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Petitioners

May 15, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

44 pp

QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a narcotics-detection dog around the exterior of each stopped automobile are unlawful under the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are the City of Indianapolis, Indiana, and Bart Peterson, in his official capacity as Mayor of the City of Indianapolis. On January 1, 2000, while the parties were engaged in briefing on the petition for certiorari, Mayor Peterson succeeded Stephen Goldsmith as Mayor of Indianapolis and, therefore, has been substituted as a party in this case.

Respondents are James Edmond and Joell Palmer, on their own behalf and on behalf of a certified class of motorists who have been stopped or are subject to being stopped at certain roadway checkpoints in Indianapolis.

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IN THE

Supreme Court of the United States

NO. 99-1030

CITY OF INDIANAPOLIS, INDIANA, AND
BART PETERSON, IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioners,

V.

JAMES EDMOND AND JOELL PALMER,
ON THEIR OWN BEHALF AND ON BEHALF OF
A CLASS OF THOSE SIMILARLY SITUATED,
Respondents.

**On Writ of Certiorari to the
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 183 F.3d 659 (7th Cir. 1999). The opinion of the district court (Pet. App. 24a-48a) is reported at 38 F. Supp. 2d 1016 (S.D. Ind. 1998).

JURISDICTION

The court of appeals entered its judgment on July 7, 1999. The court denied a timely petition for rehearing on August 18, 1999. On November 1, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 16, 1999. The petition for a writ of certiorari was filed on December 15, 1999. The Court granted the petition on February 22, 2000. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision is the Fourth Amendment to the United States Constitution (made applicable to the states and their local governments by the Due Process Clause of the Fourteenth Amendment):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. In August 1998, the City of Indianapolis (City) began operating a roadway-checkpoint program. Under the program, the Indianapolis Police Department (IPD) administers the checkpoints at fixed locations according to specific written guidelines. Pet. App. 25a-27a. IPD supervisors select checkpoint locations weeks in advance "based on geographical suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which [would] minimize the interference with normal traffic flow . . . ." *Id.* at 56a. When operating the checkpoints, IPD officers post lighted signs to warn approaching motorists that they should be prepared to stop for a "narcotics checkpoint" where a "narcotics K-9" will be in use. *Id.* at 57a. To further warn motorists, the IPD positions marked cruisers near the checkpoints. *Id.*

Officers stop a predetermined number of vehicles in sequence as they approach a checkpoint. While officers process these stopped vehicles, other traffic continues without interruption. After processing each stopped vehicle, officers stop a new group of the same predetermined number of motorists. The guidelines permit no deviations from this procedure. Pet. App. 57a.

A team of officers, at least one of whom is dressed in full uniform, approach each stopped vehicle. An officer informs the driver that he or she has been stopped at a narcotics checkpoint, asks to see a driver's license and vehicle registration, and checks for signs of driver impairment.[1] Simultaneously, other officers walk around the vehicle's exterior a narcotics-detection dog that sniffs for narcotics. Pet. App. 57a. An officer investigates further only if he or she develops individualized suspicion of a regulatory violation, driver impairment, a threat to officer safety, or a narcotics or other crime. *Id.* Otherwise, the officers allow stopped motorists to leave without further delay. *Id.*

The IPD officers attempt to stop no motorist for longer than five minutes (unless officers discover grounds for a longer detention). Pet. App. 51a. The average stop lasts only two to three minutes. *Id.* at 57a. The IPD's checkpoint procedures prevent processing delays and traffic back-ups. *Id.* If traffic becomes congested, officers "would either suspend operation of the checkpoint or institute traffic control measures until the back-up had cleared." *Id.* at 58a.

The City operated six checkpoints between August and November of 1998. The IPD stopped a total of 1,161 vehicles and arrested 104 motorists—an effectiveness (or "hit") rate of nine percent. Arrests were divided almost equally between narcotics offenses (fifty-five arrests) and other crimes (forty-nine arrests). Pet. App. 3a-4a.

2. Respondents James Edmond and Joell Palmer, who allege being stopped at a checkpoint, brought this action in the United States District Court for the Southern District of Indiana on behalf of themselves and other similarly situated mo-

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[1] If a driver does not produce a driver's license, officers run a computer check (using computer terminals located in police vehicles at the checkpoint) to determine whether the driver has a valid license and whether any outstanding warrants exist for the driver. Pet. App. 58a.

torists. Respondents allege that the City "violated the Fourth Amendment by using roadblocks to seize motorists without individualized suspicion for the primary purpose of determining if they possess or are under the influence of illegal drugs." Pet. App. 32a. They sought an injunction to prohibit the City from using checkpoints. *Id.* at 25a.

The parties stipulated to the material facts and to the certification of a class consisting of all motorists stopped, or who are subject to being stopped, at checkpoints "maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drugs and unlawful drug use." Pet. App. 25a n.1, 30a. The district court denied respondents' preliminary injunction motion. *Id.* at 25a. The court first concluded that the constitutionality of the checkpoints should be analyzed under the balancing test articulated in *Brown v. Texas*, 443 U.S. 47 (1979). Pet. App. 34a. The court rejected respondents' contention that the court could balance the interests implicated by a checkpoint only if the government demonstrates a "special need" for conducting the checkpoint that goes beyond the ordinary need to enforce criminal laws. *Id.* at 34a-35a. The court explained that in upholding the constitutionality of sobriety checkpoints, this Court held that no such showing is required in "cases dealing with police stops of motorists on public highways." *Id.* at 35a (quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990)).

Turning to the balance of interests at stake, the district court concluded that the City's interest in interdicting narcotics users and traffickers not only is "beyond serious dispute" but is also—given the sizable proportion of arrests—significantly advanced by the checkpoints. Pet. App. 35a-36a. With respect to the intrusions on motorists, the court found that law-abiding motorists would know that the stops had been officially authorized (and so would not be unduly alarmed by them) and that the IPD's guidelines adequately restrict the officers' discretion. *Id.* at 37a. The court also

concluded that the brief detention of a motorist to check his or her license and registration "is fairly non intrusive" and that any intrusion from "having a dog sniff the exterior of a motorist's vehicle" is "similar to that of an officer looking for contraband in plain view." *Id.* at 39a-40a. "Overall," the court concluded, "the checkpoints . . . are targeted effectively and are limited sufficiently to combat the city's drug crisis with minimal intrusion on motorists." *Id.* at 40a.

3. A divided court of appeals reversed. Pet. App. 1a. Writing for the majority, Chief Judge Posner acknowledged that if "reasonableness is to be assessed at the level of the entire program," rather than at the level of "the individual stop," then "these roadblocks probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops." *Id.* at 3a. The court believed, however, that it must review each individual stop because "courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement." *Id.* at 4a. In the court's view, the City's program was aimed at "general criminal law enforcement" and was "meant to intercept a completely random sample of drivers," but "there is neither probable cause nor articulable suspicion to stop *any* given driver." *Id.* at 5a-6a. For those reasons, the court held, the program was unconstitutional—at least absent some "urgent considerations of the public safety," such as a belief that "a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis." *Id.* at 6a. The City's failure to establish "such urgency," the court concluded, required the City to comply "with the normal principles constraining law enforcement." *Id.*

Referring to *Sitz*, the court concluded that sobriety checkpoints are permissible at the program level because they are not concerned "primarily with catching crooks," but are "designed to protect other users of the road from the dangers posed by drunk drivers." Pet. App. 8a. And referring to

United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the court believed that checkpoints to intercept illegal immigrants are *sui generis* because they "depend ultimately on [Congress's] sovereign powers over foreign relations, foreign commerce, citizenship, and immigration." Pet. App. 9a.

Finally, the court of appeals acknowledged that the City's program "often discover[s] violations of the traffic laws," and that the City's checkpoints could be constitutional "[i]f the purpose of the roadblock program were to discover such violations." Pet. App. 10a. But it concluded that the City's checkpoint program cannot be upheld on that basis because "purpose . . . is critical to . . . legality," and the City's use of a narcotics dog "shows—what is anyway not contested—that the purpose of the roadblocks is to catch drug offenders." *Id.* at 10a-11a. The court suggested that the situation might be different "if the primary purpose were to detect drunken drivers" because in that case "the dog could be added to the roadblock . . . on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible." *Id.* at 11a.

Judge Easterbrook dissented. Pet. App. 13a. He observed that, contrary to the majority's view, *Martinez-Fuerte* and *Sitz* permit courts to analyze checkpoints at the program level where the checkpoints are used to enforce the criminal laws. *Id.* Explaining that the inquiry under the Fourth Amendment is "objective," Judge Easterbrook also rejected the majority's focus "on the 'primary' or 'real' motive for the roadblock." *Id.* at 13a-14a. According to Judge Easterbrook, "[s]o far as the fourth amendment is concerned, there is no difference between a roadblock originally designed to catch drug peddlers and also used to catch drunk drivers, and a roadblock originally designed to catch drunk drivers and also used to catch drug peddlers." *Id.* at 15a.

Judge Easterbrook also observed that neither *Sitz* nor *Martinez-Fuerte* used the majority's analytical approach, but that

both cases balanced the "slight" intrusion resulting from a checkpoint against the success of the checkpoint—so long as the officers' discretion is adequately constrained by objective guidelines. Pet. App. 18a-20a. Here, he noted, "Indianapolis was at pains to establish a rigorous protocol for its stops. Roadblocks are fixed; the number of cars selected for inspection is fixed; the procedure following a stop is fixed." *Id.* at 20a. Finally, he rejected the majority's characterization that *Martinez-Fuerte* turned on "a 'border exception' or 'immigration exception' to normal fourth amendment principles . . .," a theory that would have the anomalous effect of giving the federal government "greater freedom to conduct searches and seizures than state and local governments . . . ." *Id.* at 21a-22a.

SUMMARY OF ARGUMENT

I. The City's checkpoints are constitutionally indistinguishable from the checkpoints upheld in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). As in *Martinez-Fuerte* and *Sitz*, the City's interests in operating the checkpoints outweigh the checkpoints' minimal intrusion on motorists.

First, "[i]t is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 673 (1995). Because of the ease with which drugs are concealed and transported in automobiles, the City's interest in using checkpoints to battle illegal drugs is substantial. The City also uses the checkpoints to check licenses and registrations and to look for signs of driver impairment—activities this Court has deemed important. *See Delaware v. Prouse*, 440 U.S. 648, 658 (1979); *Sitz*, 496 U.S. at 454-55.

Secondly, the City's checkpoints impose minimal intrusions on motorists. Written guidelines instruct the officers precisely how to conduct the stops and leave no room for discretion. Pet. App. 26a-27a. Officers merely ask each driver for a license and registration and look for signs of driver impairment while other officers escort a narcotics-detection dog around the exterior of each vehicle. *Id.* at 57a. On average, each stop lasts between two and three minutes. *Id.* Because the City's use of a narcotics-detection dog to sniff a stopped vehicle is not a search (*United States v. Place*, 462 U.S. 696, 707 (1983)), the intrusion on motorists is no greater than in *Martinez-Fuerte* and *Sitz*, and is insignificant compared to the weight of the City's interests.

Thirdly, the City's checkpoints are more effective than those upheld in *Martinez-Fuerte* and *Sitz*. Officers arrested nine percent of all motorists stopped, and roughly half of those were for narcotics-related offenses. Pet. App. 3a-4a.

II. Contrary to the Seventh Circuit's view, *Martinez-Fuerte* and *Sitz* apply where, as here, the checkpoints further ordinary law-enforcement ends. The checkpoints in *Martinez-Fuerte* were designed to catch persons illegally smuggling aliens into the United States. Similarly, the checkpoints in *Sitz* were designed to catch individuals illegally driving drunk. Moreover, the analytical underpinnings of those cases are different from the "special needs" cases on which the Seventh Circuit relied. *Martinez-Fuerte* stressed that brief automobile checkpoint seizures do not violate the Fourth Amendment in part because motorists have reduced expectations of privacy and freedom of movement. *Martinez-Fuerte*, 428 U.S. at 561-62. "Special needs" cases, on the other hand, arise from searches (not seizures) and are premised on the doctrine of administrative necessity; they are limited to special contexts because they involve highly invasive government conduct. *See, e.g., Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 620 (1989); *National Treasury Em-*

ployees Union v. Von Raab, 489 U.S. 656, 666 (1989). Automobile checkpoint cases and "special needs" cases thus present independent justifications (and independent limitations) for evaluating government conduct "at the program level." Pet. App. 4a. The Seventh Circuit erred in conflating the two jurisprudential tracks, and its *post-hoc* rationales for *Martinez-Fuerte* and *Sitz* subvert the teachings of Fourth Amendment history and principles of federalism.

Even if the City's use of checkpoints to interdict illegal drugs is not valid under *Martinez-Fuerte* and *Sitz*, the Seventh Circuit was wrong to ignore the City's other valid goals. IPD officers check drivers' licenses and registrations and look for signs of impairment at the checkpoints—all activities that properly may serve as predicates for checkpoints. The City's "primary purpose" (*see* Pet. App. 11a) in operating the checkpoints is constitutionally irrelevant. This Court repeatedly has held that the objective reasonableness of a seizure, and not the subjective purpose behind it, determines Fourth Amendment compliance. *See Whren v. United States*, 517 U.S. 806, 812 (1996). Under well-established Fourth Amendment doctrine, the reasonableness of the officers' conduct ends the inquiry regardless of the City's purposes, and the Seventh Circuit was wrong to evaluate the checkpoints based upon "what the Mayor thought last year." Pet. App. 16a.

ARGUMENT

I. THE CITY'S CHECKPOINT PROGRAM IS VALID UNDER THE BALANCING TEST THE COURT HAS USED IN CHECKPOINT CASES

The Court has held that properly administered checkpoints used to detect crimes are reasonable under the Fourth Amendment, regardless of individualized suspicion. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The Court's decisions demonstrate that the City's checkpoints are

constitutional because they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979).

A. The Fourth Amendment Permits Police to Use Checkpoints To Detect Crime

Martinez-Fuerte and *Sitz* control this case. *Martinez-Fuerte*, recognizing that "surreptitious entries" of illegal aliens from Mexico "pose[] formidable law enforcement problems," upheld the constitutionality of fixed highway checkpoints that the United States Border Patrol operated up to 100 miles inland from the Mexican border. 428 U.S. at 552, 558. The sole purpose of those checkpoints was to catch violators of criminal immigration laws. The Court upheld the checkpoint program because the government's substantial interest in preventing illegal immigration outweighed individual motorists' interests in being free from the minimally intrusive stops. *Id.* at 556-57. A central concern of the Court in balancing these interests was that law enforcement discretion be limited to prevent abusive stops. *See id.* at 559. In contrast to roving patrol stops, "routine checkpoint stops do not intrude similarly on the motoring public," and "checkpoint operations both appear to and actually involve less discretionary enforcement activity." *Id.* at 559. *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (holding that a roving police unit could not stop motorists without individualized suspicion of wrongdoing); *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (striking down roving patrols that gave individual officers far-reaching discretion to make suspicionless stops to uncover illegal aliens).

Martinez-Fuerte foreshadowed the Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979), which more specifically announced a three-part balancing test for determining the reasonableness of seizures that are not based upon individualized suspicion and are less severe than arrest. In *Brown*, the

Court explained that the constitutionality of the seizure depended on "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 51. The Court emphasized that balancing these interests must ensure that an "individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.* To vindicate this concern, "[t]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* (emphasis added).

That same year, in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), the Court struck down random stops to check for drivers' licenses and registrations, but observed that "questioning of all oncoming traffic at roadblock-type stops" would be perfectly valid under the Fourth Amendment. *Prouse* recognized that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654. The Court added that "[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " *Id.* at 654-55. *Prouse* stressed the "danger to life and property posed by vehicular traffic and * * * the difficulties that even a cautious and an experienced driver may encounter," and concluded that the public has a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." *Id.* at 658.

Drawing upon the teachings of *Brown* and *Prouse*, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990), upheld sobriety checkpoints and thus reaffirmed *Martinez-Fuerte*'s holding that fixed checkpoints used to detect criminal activity comply with the Fourth Amendment so long as the discretion of individual officers is limited. In *Sitz*, police stopped all vehicles passing through the checkpoint and briefly examined the drivers for signs of intoxication. *Sitz*, 496 U.S. at 447. If a driver showed signs of intoxication, the police would investigate further, sometimes administering sobriety tests. *Id.* Police would arrest the driver if the additional investigation showed the driver was intoxicated. *Id.* Drivers not exhibiting signs of intoxication were allowed to proceed after a brief stop. *Id.*

Relying on *Brown*, *Sitz* held that where police stop motorists based on a procedure embodying neutral criteria rather than individual suspicion, courts determine reasonableness by balancing: (1) the state's interest; (2) the effectiveness of the procedure in furthering that interest; and (3) the level of intrusion into individual privacy caused by the procedure. 496 U.S. at 449-50. The state's interest in eradicating illegal drunk driving, the Court ruled, outweighed motorists' Fourth Amendment interests in not suffering the "slight" objective intrusion caused by the brief stops. *Id.* at 451. With respect to motorists' subjective views, the Court concluded that the "fear and surprise" the checkpoint stops may impose on law-abiding drivers also would be minimal because, as in *Martinez-Fuerte*, "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Id.* at 452-53 (quoting *Martinez-Fuerte*, 428 U.S. at 558). Subjective intrusion on motorists was also minimal because the "checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle." *Id.*

With respect to the remaining *Brown* balancing factor—the effectiveness of the checkpoints—*Sitz* held that it "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed . . . ." [2] *Id.* at 453. "[F]or purposes of Fourth Amendment analysis," the Court stated, "the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id.* at 453-54.

B. The City's Checkpoint Program Is Reasonable Under the Fourth Amendment's Balancing Test

When compared to the interests at stake in *Martinez-Fuerte* and *Sitz*, the City's interest in operating its checkpoints plainly outweighs individual motorists' interests in being free from a brief, minimally intrusive, non-discretionary stop. As Judge Easterbrook stated below, "[o]ne would suppose that our case is *a fortiori* from *Sitz*." Pet. App. 13a.

1. The City has vital interests in stemming the tide of illegal drugs, ensuring that motorists comply with license and registration requirements, and arresting drivers who are impaired.

The IPD uses the checkpoints to accomplish several law-enforcement and public safety ends. Officers conduct a dog sniff of stopped cars, review drivers' licenses and registrations and look for signs that drivers are impaired. Pet. App. 26a. The City has a substantial interest in pursuing each of

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[2] The Mayor of Indianapolis is the elected public official accountable for IPD operations. The Mayor exercises hiring and firing authority over the Director of Public Safety, who in turn is responsible for the daily operations of the IPD, including hiring the Chief of Police. *See* Indianapolis and Marion County, Ind., Rev. Code (1998) §§ 201-3, 251-101, 251-211, 251-212, 253-103.

these goals. *See Sitz*, 496 U.S. at 451; *Brown*, 443 U.S. at 51; *Martinez-Fuerte*, 428 U.S. at 556-57.

Narcotics Detection: The Court has often recognized that the scourge of illegal drugs presents one of the "greatest problems affecting the health and welfare of our population" (*National Treasury Employees Union v. Von Raab*, 489 U.S. 659, 668 (1989)) and has created a "veritable national crisis in law enforcement" (*United* States *v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985)). Thus, "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J. concurring). *See also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 673 (1995) ("[I]t is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods."). Justice Powell commented on the immense hurdles law-enforcement officials face in combating clandestine drug operations:

> Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

United States v. Place, 462 U.S. 696, 704 n.5 (1983) (quoting *Mendenhall*, 446 U.S. at 561-62 (Powell, J., concurring)).

Illegal drug use and trafficking continue to engender crime-prevention and law-enforcement crises. The Office of National Drug Control Policy recently reported that "[d]rug-related offenses and drug-using lifestyles are major contributors to the U.S. crime problem . . . ." Office of National Drug Control Policy, *Drug Policy Information Clearinghouse Fact Sheet* 1 (March 2000). Drug trafficking itself "tends to be associated with the commission of violent crimes," and "murders related to narcotics still rank as the fourth most

documented murder circumstance out of twenty-four possible categories." *Id.* at 4. A 1997 national survey of prison inmates showed that thirty-three percent of state prisoners admitted to committing their offenses while under the influence of drugs. Bureau of Justice Statistics, *Substance Abuse and Treatment, State and Federal Prisoners, 1997* 1 (January 1999). In Indianapolis, the correlation between drug use and crime is even greater: In 1998, 66.8 percent of male arrestees and 67.1 percent of female arrestees tested positive for drugs at the time of their arrests. United States Dep't of Justice, National Institute of Justice, *1998 Annual Report on Drug Use Among Adult and Juvenile Arrestees* 42 (April 1999). The conclusion is inescapable: "The evidence indicates that drug users are more likely than nonusers to commit crimes, that arrestees frequently were under the influence of a drug at the time they committed their offense, and that drugs generate violence." Office of National Drug Control Policy, *Drug Policy Information Clearinghouse Fact Sheet* 4 (March 2000).

Crime is not the sole problem attributable to illegal drugs. A recent study the United States Department of Health and Human Services commissioned estimates that in 1992 alone the "economic cost to society" of drug abuse and dependence in the United States was $98 billion. Henrick Harwood, et al., *The Economic Costs of Alcohol and Drug Abuse in the United States 1992*, 1-1 (1998). By 1995, the study estimates, the annual economic cost of drug abuse was $110 billion. *Id.* at 1-9. The total economic cost includes the direct costs the government incurred for law enforcement as well as lost productivity, wages, and health-care costs attributable to drug abuse. *Id.* at 1-3 (Table 1.1).

Furthermore, the ease with which drugs may be concealed in automobiles poses special problems for law enforcement. In *Martinez-Fuerte*, the Court concluded that the flow of traffic is simply too heavy to permit the "particularized study of a

given car that would enable it to be identified as a possible carrier of illegal aliens." 428 U.S. at 557. That logic applies with even more force to the concealed transportation of narcotics, and authorities have determined that automobiles provide secretive transportation that is critical to the drug trade. The Drug Enforcement Administration has initiated Operation Pipeline specifically to detect and seize illegal narcotics being transported to drug markets in automobiles. *See* United States Department of Justice, Drug Enforcement Administration, *Operations Pipeline and Convoy* (visited May 10, 2000) <www.usdoj.gov/dea/programs/pipecon.htm>. And local authorities charged with eradicating open-air drug markets have concluded that "when you eliminate the drive-by trade, you eliminate a lot—maybe the biggest part—of the retail market" for illegal drugs. David M. Kennedy, United States Department of Justice, National Institute of Justice, *Closing the Market: Controlling the Drug Trade in Tampa, Florida*, 8 (April 1993) (quoting Tampa Police Major Bert Hatcher).

To be sure, the City uses checkpoints to enforce the law. But the checkpoints are geared toward far broader goals of preventing crime and improving community safety. The checkpoints are one part of the City's multi-faceted effort to prevent the social costs of illegal drugs. Within this program is the Indianapolis Weed and Seed Initiative, which is an inter-agency initiative that "weeds out," among other problems, drug use and trafficking in targeted neighborhoods, and then "seeds" the neighborhoods through social and economic revitalization. Office of National Drug Control Policy, *Drug Policy Information Clearinghouse: Indianapolis, Indiana, Profile of Drug Indicators* 2 (December 1999). Another part of the program is the Safe Neighborhood Task Force, which works to eradicate drug markets in the community through, for example, citizen pickets of drug markets, demonstrations against landlords who rent properties to drug dealers, citizen patrols designed to intimidate drug dealers, and police checkpoints. *Id.* at 3. Indianapolis has made it a priority to battle

the social tragedy of drug use and distribution, and the checkpoint program is one front of that battle.

License and Registration Checks: As with the State of Delaware in *Prouse*, Indiana has a vital interest in requiring that its motorists have proper licenses and registrations. Furthermore, as does Delaware, Indiana requires drivers to prove they have a minimum amount of insurance before they may register their cars. Ind. Code § 9-25-4-1 (1997). Thus, the City's use of checkpoints to check automobile licenses and registrations vindicates a number of "legitimate" and "vital" government interests. *See Delaware v. Prouse*, 440 U.S. 648, 658-59 (1979).

Sobriety Checks: In *Sitz*, the Court concluded that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." 496 U.S. at 451. The Court quoted several sources underscoring the "astounding figures" for deaths and property damage owing to drunk driving. *Id.* (citing *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957); 4 Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment* § 10.8(d), 71 (2d ed. 1987)); *Sitz* noted that the Court has "repeatedly lamented the tragedy" associated with drunken driving deaths. *Id.* (quoting *South Dakota v. Neville*, 459 U.S. 553, 558 (1983)). The City's checkpoints vindicate these interests as well.

2. The City's brief checkpoint stops are minimally intrusive.

In terms of both objective and subjective intrusion, the City's checkpoint stops are materially identical to those upheld in *Martinez-Fuerte* and *Sitz*. As with the stops in those cases, the IPD's checkpoint stops are brief, lasting between two and three minutes on average. Pet. App. 57a. IPD officers' inquiries are also limited. An officer asks each driver to produce a valid license and registration and briefly checks the driver for signs of drug or alcohol impairment; simultaneously, another officer walks a drug-sniffing dog around the

exterior of the car. *Id.* Only if there is probable cause that the motorist has committed a crime or poses a threat to officer safety does the IPD conduct a longer, more extensive check of the vehicle. *Id.*

IPD officers operate the checkpoints to minimize whatever subjective intrusion or "fear and surprise" motorists might feel upon encountering the checkpoints. *See Sitz*, 496 U.S. at 452. IPD supervisors, not individual officers, determine well in advance the checkpoints' locations. Pet. App. 56a. IPD officers post road signs warning motorists that they are approaching a police narcotics checkpoint, and they post marked police cruisers nearby, with flashing lights, to reinforce the message that the checkpoints are being operated by police. *Id.* at 57a. Motorists are not pulled over individually but are ordered to stop along with all other cars in a predetermined sequence. *Id.* At least one of the officers who approaches each vehicle is in full uniform. *Id.* Thus, any stopped motorist can observe that other motorists are being stopped and that the officers have visible signs of authority. *See Sitz*, 496 U.S. at 453; *Martinez-Fuerte*, 428 U.S. at 558; *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975).

Furthermore, as in *Sitz*, the IPD operates its checkpoints according to detailed, written guidelines that limit the officers' discretion. The guidelines set forth the procedures for officers to follow at each stage of the encounter. Pet. App. 26a-27a. The guidelines instruct officers exactly what to say to motorists ("ask driver for license and registration. Advise the citizen that they are being stopped briefly at a drug checkpoint") and what to observe ("Look for signs of impairment, conduct open view examination of vehicle from outside vehicle."). *Id.* The guidelines describe conditions when an officer may ask a driver to step out of the car or search the car for a weapon or contraband. *Id.* Significantly, the guidelines' final paragraphs communicate in no uncertain terms that officers lack discretion:

8. EVERY VEHICLE BEING STOPPED MUST BE EXAMINED IN THE SAME MANNER UNTIL PARTICULARIZED SUSPICION OR PROBABLE CAUSE DEVELOPS. THERE WILL BE NO EXCEPTIONS! A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE EVERY VEHICLE STOPPED AT THE CHECKPOINT.

9. THERE WILL BE NO DISCRETION GIVEN TO ANY OFFICER TO STOP ANY VEHICLE OUT OF SEQUENCE. WHEN THE SEQUENCE OF VEHICLES HAVE BEEN TOTALLY DEALT WITH AND EITHER RELEASED OR SEIZED, THE VERY NEXT SEQUENCE OF VEHICLES WILL BE STOPPED. NO VEHICLES WILL BE PERMITTED TO PASS THE CHECKPOINT BEFORE ANOTHER SEQUENCE IS STOPPED AFTER ALL VEHICLES IN THE CURRENT SEQUENCE HAVE BEEN RELEASED OR SEIZED.

Id. at 54a.

The City thus assuages the Court's expressed concerns that unbridled discretion in the hands of police officers can cause a substantial Fourth Amendment intrusion. *See Delaware v. Prouse*, 440 U.S. 648, 661 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973). As with the checkpoints in *Martinez-Fuerte* and *Sitz*, the City's checkpoints cause only a minimal intrusion on motorists' Fourth Amendment interests.

It bears emphasis that the IPD's use of the narcotics-detection dog does not present an independent intrusion of constitutional significance. In *United States v. Place*, 462 U.S. 696 (1983), the Court held that the government's use of a trained dog to sniff the exterior of luggage at an airport did not constitute a search under the Fourth Amendment. The Court explained that a dog sniff is far less intrusive than a search:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Id. at 707. The uniquely limited intrusiveness of a dog sniff ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure," *id.*) applies equally to the IPD's instructing a dog to sniff the exterior of a vehicle. A sniff does not require the IPD to open any compartment of the vehicle or to expose noncontraband items to public view, and the sniff discloses only the presence of illegal narcotics, a contraband item. *See Bond v. United States*, 120 S. Ct. 1462, 1466 (2000) (Breyer, J., dissenting) (commenting on "the accepted police practice of using dogs to sniff for drugs hidden inside luggage"). And because the sniff is conducted while an officer checks the driver's license and car registration and looks for signs of impairment, the sniff does not further infringe the motorist's freedom of movement.[3]

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[3] In any event, respondents challenge only the initial stop, not the use of the narcotics-detection dog. Respondents' Seventh Circuit Reply Brief at 3 n.1.

3. The City's checkpoints significantly advance its substantial interests, as evidenced by their high hit rate.

The final component of the balancing test is "the degree to which the seizure advances the public interest." *Brown v. Texas*, 443 U.S. 47, 51 (1979). The City's program, with a total hit rate of 9.4 percent, is far more successful than the checkpoint programs upheld in *Martinez-Fuerte* and *Sitz*. In *Martinez-Fuerte*, the checkpoints detected illegal aliens in only .12 percent of the cars passing through the checkpoint. 428 U.S. at 554. In *Sitz*, police arrested 1.6 percent of the drivers. 496 U. S. at 455. The City's hit rate is divided almost equally between arrests for narcotics violations (fifty-five arrests, or 4.74 percent) and other violations or crimes (fifty-four arrests, or 4.65 percent). Pet. App. 13a, 55a. Even if the only relevant hit rate were of narcotics arrests, the City's checkpoints would still be more successful than those upheld in *Martinez-Fuerte* and *Sitz*.

* * * *

Brown balancing applies in this case with particular ease. *Martinez-Fuerte* and *Sitz* are the proper precedents for the Court to weigh the City's interests against the degree of Fourth Amendment intrusion of the checkpoints. The City vindicates interests of the utmost significance when it interdicts illegal narcotics, enforces license and registration laws, and arrests drunk drivers. Given the stops' brevity and the checkpoints' tightly controlled operation, individual motorists suffer only a minimal intrusion on their Fourth Amendment rights. And the checkpoints' high hit rate confirms that the City is acting reasonably.

II. THE CITY DOES NOT NEED INDIVIDUALIZED SUSPICION TO STOP MOTORISTS AT ITS CHECKPOINTS

The Seventh Circuit concluded that, because the City's primary goal in operating its checkpoints is to interdict drugs,

its checkpoints belong in a different jurisprudential category than the roadblocks upheld in *Sitz* and *Martinez-Fuerte* and therefore may not be justified under the Fourth Amendment "at the program level." Pet. App. 4a. But the Seventh Circuit was wrong to conclude that *Sitz* and *Martinez-Fuerte* are based on this Court's "special needs" jurisprudence. It was also wrong to hold that, in any event, the City does not pursue any "special needs" that justify the roadblocks.

A. *Martinez-Fuerte* and *Sitz* Upheld Checkpoints that Vindicated Normal Law Enforcement Purposes

1. *Martinez-Fuerte* and *Sitz* leave no doubt that checkpoints designed to detect evidence of criminal conduct are permissible.

The officers in *Martinez-Fuerte* and *Sitz* operated their checkpoints with the same ultimate purpose: to arrest those suspected of committing crimes. In *Martinez-Fuerte*, Border Patrol officers arrested each of the defendants on suspicion of illegally transporting aliens, a violation of 8 U.S.C. § 1324 (a)(2). *United States v. Martinez-Fuerte*, 428 U.S. 543, 545, 550 (1976). Federal authorities prosecuted the defendants for smuggling illegal aliens, and at their trials, each defendant sought to suppress evidence that the Border Patrol officers discovered at the checkpoints. *Id.* at 545. The motions of Amado Martinez-Fuerte and Rodolfo Sifuentes were unsuccessful, and they were convicted of transporting illegal aliens. *Id.* at 548, 550. The Court reviewed the constitutionality of the Border Patrol's checkpoints following appellate review of these criminal cases. *See id.* at 551.

Martinez-Fuerte stressed the importance of the checkpoints in handling "law enforcement problems." 428 U.S. at 552. The Court also noted that federal authorities would routinely prosecute smugglers such as the *Martinez-Fuerte* defendants whom Border Patrol agents apprehended. *Id.* at 553 n.9. The Court was well aware that the Border Patrol checkpoints were

directly targeted at criminal activity and were designed to detect evidence used in criminal prosecutions. And, notably, the Court expressed no reservations about how evidence discovered at the checkpoints might be used. Ultimately, the Court affirmed the convictions of Martinez-Fuerte and Sifuentes and thus approved the government's use of vehicle checkpoints to discover evidence of criminal conduct. *Martinez-Fuerte*, 428 U.S. at 567.

Similarly, the sobriety checkpoints in *Sitz* were targeted at identifying and arresting drunk drivers. The Michigan Department of State Police and state prosecutors helped develop the roadblocks, which were operated with the local Sheriff's Department's assistance. *Michigan Dep't. of State Police v. Sitz*, 496 U.S. 444, 447-48 (1990). The guidelines governing the checkpoints' operation specifically directed that "[s]hould the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made." *Id.* at 447. The respondents in *Sitz* argued that the Court should not apply the *Brown* balancing test precisely *because* the Michigan State Police used the checkpoints for normal law enforcement purposes. *Id.* at 450. The Court, well aware of the criminal-investigation ends behind the sobriety checkpoints, rejected the respondents' arguments that the balancing test was improper. *Id.* It employed the *Brown* balancing test and upheld the criminal-investigatory sobriety checkpoints. *Id.* at 455 (citing *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)).

2. *Martinez-Fuerte* and *Sitz* are not "special needs" or administrative search cases.

Contrary to the Seventh Circuit's understanding (Pet. App. 4a), the Court's checkpoint cases turn on motorists' reduced expectations of privacy and freedom of movement, not special needs or administrative necessity. In reviewing the constitutionality of immigration checkpoints, *Martinez-Fuerte* relied on *Camara v. Municipal Court*, 387 U.S. 523 (1967), for the proposition that "the Fourth Amendment imposes no

irreducible requirement of [individualized] suspicion." *Martinez-Fuerte*, 428 U.S. at 561. *Camara* upheld a local government's ability to conduct inspections of private dwellings for housing-code violations without first obtaining either the occupant's consent or a warrant predicated on individualized suspicion. *Camara*, 387 U.S. at 537. In place of individualized suspicion, *Martinez-Fuerte* explained, the Court in *Camara* "examined the government interests advanced to justify such routine intrusions 'upon the constitutionally protected interests of the private citizen' . . . and concluded that under the circumstances the government interests outweighed those of the private citizen." *Martinez-Fuerte*, 428 U.S. at 561 (quoting *Camara*, 387 U.S. at 534-35). Though acknowledging that the case before it presented circumstances substantially different from those present in *Camara*, the Court nonetheless deemed *Camara*'s analysis appropriate:

> We think the same conclusion [as in *Camara*] is appropriate here, where we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. * * * As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. * * * And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal.

Id. at 561-62 (citations omitted).

Thus, *Camara* justified a balancing approach based on the administrative necessity that made individualized suspicion unworkable in the housing inspection context. *Camara*, 387 U.S. at 537. *Martinez-Fuerte* (and later *Sitz*) justified a balancing approach based on motorists' reduced expectations of privacy and of freedom of movement. 428 U.S. at 561. When the government has a substantial interest in preventing and deterring crime that is specific to, or well-masked by, the

use of cars on public roadways, the minimally intrusive and relatively non-threatening nature of checkpoint stops permits reasonableness testing at the program level. Significantly, *Martinez-Fuerte* was not the first time the Court followed the *Camara* approach in the automobile context. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), the Court, following *Camara*, employed a reasonableness balancing test to roving immigration patrol stops. Only after concluding that the Border Patrol officers' discretion was so unfettered that it threatened a degree of intrusion on individual privacy and free passage that outweighed the government's interest did the Court conclude that individualized suspicion was necessary. *Id.* at 882.

To emphasize that its decision to apply the balancing test did *not* turn on administrative necessity, *Martinez-Fuerte* noted that the "administrative" purpose of many common checkpoint stops (including those to enforce license and registration requirements, safety requirements, and weight limits) "is of limited relevance in weighing their intrusiveness on one's right to travel." *Martinez-Fuerte*, 428 U.S. at 560 n.14. Thus, the Seventh Circuit misunderstood the rationale supporting *Martinez-Fuerte* when it characterized it as one of a number of cases relating to "primarily civil regulatory programs." Pet. App. 4a.

The Seventh Circuit's misreading of *Martinez-Fuerte* is even more apparent in the court's assertion that *Martinez-Fuerte*'s holding "depend[s] ultimately on sovereign powers over foreign relations, foreign commerce, citizenship, and immigration." Pet. App. 9a. The *Martinez-Fuerte* majority opinion nowhere expresses reliance on Congress's exclusive power over immigration (or anything else) to override generally applicable Fourth Amendment limitations on government action. In fact, as if anticipating this very misinterpretation, *Martinez-Fuerte* specifically disclaimed any such reliance:

> Congress has expressly authorized persons believed to be aliens to be interrogated as to residence, and vehicles "within a reasonable distance" from the border to be searched for aliens. * * * Our prior cases have limited significantly the reach of this congressional authorization, requiring probable cause for any vehicle search in the interior and reasonable suspicion for inquiry stops by roving patrols. * * * We understand, of course, that neither long-standing congressional authorization nor widely prevailing practice justifies a constitutional violation.

428 U.S. at 566 n.19. Furthermore, as the Court alluded, if Congress's immigration power provided an implicit Fourth Amendment override, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and *Brignoni-Ponce*, 422 U.S. 873 (where Border Patrol officers were executing the commands of Congress in making their roving patrols) not only would have reached the opposite conclusion, but also would have had no reason to engage in an extended Fourth Amendment analysis.

3. The "special needs" doctrine does not supply the proper Fourth Amendment analysis for [redacted] City's checkpoints.

The Seventh Circuit ultimately confused the rationales supporting *Martinez-Fuerte* and *Brown* with the rationale supporting the analysis in Fourth Amendment administrative *search* cases. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), Justice Blackmun, concurring, stated: "Only in those exceptional circumstances in which *special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (emphasis added). Following *T.L.O.*, the Court has relied on Justice Blackmun's formulation and has equated the government's various needs for conducting administrative searches with the "special needs" that Justice Blackmun identified. In *New*

York v. Burger, 482 U.S. 691, 702 (1987), for example, the Court upheld the warrantless inspection of a junkyard for required administrative documentation based on the state's "special needs" in enforcing junkyard licensing requirements. The Court also has held that the government may require law enforcement officers and train operators to submit to drug tests regardless of individualized suspicion based on "special governmental needs, beyond the normal need for law enforcement," in its employees' safe performance of their duties. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). And recently, the Court reined in the use of the "special needs" doctrine when it held that the state of Georgia did not have a special need for subjecting political candidates to drug testing. *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

The cases at the core of the "special needs" doctrine have not addressed the brief, low-intensity *seizures* attendant to an automobile-checkpoint stop. They have instead grappled with, and significantly limited, much more invasive and laborious government *searches* of people and their businesses, belongings, homes, and hotel rooms. *See, e.g.*, *Chandler*, 520 U.S. at 321-22 (invalidating a law requiring candidates for office to pass a drug test); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (upholding random drug testing of students who participate in interscholastic sports); *Von Raab*, 489 U.S. at 677 (upholding mandatory drugs tests for United States Customs Service employees seeking transfer or promotion to sensitive positions); *Skinner*, 489 U.S. at 633-34 (upholding mandatory drug and alcohol testing for railway employees involved in train accidents or who violate safety rules); *Burger*, 482 U.S. at 717 (upholding administrative inspections of private automobile junkyards); *T.L.O.*, 469 U.S. at 345 (upholding search of a student's purse); *Michigan v. Clifford*, 464 U.S. 287, 294-95 (1984) (limiting the scope of fire investigators' search of a home based on an adminis-

trative warrant); *Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (upholding a federal health and safety inspection of a mine); *Michigan v. Tyler*, 436 U.S. 499, 511 (1978) (limiting the justifiable range of a search of a burned store for evidence of the cause of the fire); *Abel v. United States*, 362 U.S. 217, 228-29 (1960) (upholding execution of an administrative warrant based on less than probable cause to search a suspected illegal alien's hotel room).

The requirement that the government have a "special need" beyond ordinary crime detection to conduct the search is grounded in the invasive nature of the searches at issue and, in some cases, the limits of the state or federal statutes authorizing the searches. *See, e.g., Clifford*, 464 U.S. at 298; *Donovan*, 452 U.S. at 602. Without such limits, government actors may be tempted to abuse the searches at the expense of highly valued privacy expectations. Where a minimally invasive, brief vehicle stop is at issue, there is no similar need to adopt a rigid distinction between criminal investigation needs and "special needs." [4]

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[4] *Camara* itself rejected the strict crime/regulatory distinction embraced by the Seventh Circuit in this case. Overturning *Frank v. Maryland*, 359 U.S. 360, 365 (1959), the Court in *Camara* rejected the notion that "the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). The Court also recognized the futility of crafting strict crime/regulatory distinctions, considering that all civil regulatory requirements are in some way backed up by the threat of criminal sanctions. *Id.* at 531. This skepticism of drawing a strict distinction between a city's criminal law interests and its regulatory interests bears directly on this case. While the City intends for offenders apprehended at the checkpoints to be prosecuted, such prosecutions support the important regulatory and public-policy needs that prompted the City to operate the checkpoints: to interdict illegal drugs and to keep the streets safe. These are needs that the City may—and does—pursue apart from employing criminal investigations. Thus, the checkpoints cannot be strictly characterized as a form of criminal investigation.

The "special needs" doctrine therefore does not preclude the Court's use of a "program level" balancing test to analyze brief, slightly intrusive automobile checkpoint seizures. Indeed, *Sitz* expressly rejected such incompatibility. Relying on *Von Raab*, the respondents in *Sitz* argued that the checkpoints could not be upheld at the program level because the state's only purpose was to enforce ordinary criminal law, and not to pursue some "special need." 496 U.S. at 449-50. The Court expressly dismissed this argument in terms that underscore the test to be applied in this case:

> [I]t is perfectly plain from a reading of *Von Raab*, which cited and discussed with approval our earlier decision in *United States v. Martinez-Fuerte* * * * that it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, *supra*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas*, *supra*, are the relevant authorities here.

496 U.S. at 450 (citation omitted).[5] Thus, the "special needs" cases do not control here.

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[5] *Chandler* implicitly acknowledges the separate lines of authority between the "special needs" balancing cases and the checkpoint balancing cases. In stating that "a search ordinarily must be based on individualized suspicion of wrongdoing . . . [b]ut [that] particularized exceptions to the main rule are sometimes warranted based on 'special needs, beyond the normal need for law enforcement,'" the Court did not cite *Sitz*, *Martinez-Fuerte*, or any other checkpoint case. Instead, the Court cited core special needs cases: *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). *See Chandler v. Miller*, 520 U.S. 305, 313 (1997). That the Court relied upon *Von Raab* in *Chandler*, a "special needs" case, and distinguished *Von Raab* in *Sitz*, a checkpoint case, demonstrates the peaceful coexistence of the two lines of suspicionless search-and-seizure authority that apply in two different contexts.

4. A revisionist interpretation of *Martinez-Fuerte* and *Sitz* as "special needs" cases poses troubling federalism problems.

To read *Martinez-Fuerte* and *Sitz* as turning on government justifications beyond the need for ordinary law enforcement not only would be inaccurate, but would also free Congress of significant Fourth Amendment constraints while simultaneously inhibiting states and municipalities from experimenting with innovative law-enforcement techniques. The Seventh Circuit found that *Martinez-Fuerte* did not control here because *Martinez-Fuerte* rested on an enumerated power of the federal government. Pet. App. 9a. This revisionist interpretation of *Martinez-Fuerte* creates an anomaly troubling to federalism. The Framers adopted the Fourth Amendment to limit the federal government as a reaction to the abuse of international trade and customs powers they had suffered as colonists when Crown officials exercised unfettered discretion in searching colonists' warehouses for dutiable goods. *See* Leonard W. Levy, *Original Intent and the Framers' Constitution* 234-46 (1988); Telford Taylor, *Two Studies in Constitutional Interpretation* 23-44 (1969). *See also* Pet. App. 22a. Anti-federalists such as Richard Henry Lee complained about the federal government's similar powers under the Constitution. Levy, *Original Intent* at 244-45. Intending to derail ratification, Lee proposed a bill of rights, including restrictions on searches and seizures. *Id.* at 241. But under James Madison's political guidance, re-drafted versions of Lee's proposal instead justified ratification as a prophylactic against potential federal government abuses similar to those that enraged the colonists. *See id.* at 241-46. And until incorporation, the Fourth Amendment constrained only the federal government. Similar curbs on state police authority were left entirely to the states and their constitutions. *See Irvine v. California*, 347 U.S. 128, 134 (1954) ("Never until June of 1949 [in *Wolf v. Colorado*, 338 U.S. 25 (1949)] did this Court

hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment.").

Nothing in this Court's subsequent cases or in the text, structure, or history of the Constitution explains why the Fourth Amendment passed through the Fourteenth with greater limitations on state and local governments than on the federal government. To the contrary, as Judge Easterbrook observed, such an interpretation is "at war" with the Constitution's text and history. Pet. App. 22a. At the Constitutional Convention, Patrick Henry protested that the potential oppressiveness of "federal sheriffs" acting under distant superiors was greater than that threatened by local officers. Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 92 (1937). This historical predicate for the Fourth Amendment remains true now, not in the least because "[s]earches by the national government pose a serious threat to the citizenry; searches by local governments pose less, because movement within the country is easy." Pet. App. 22a.

Especially given the severity and intractability of the war against drugs, municipalities need flexibility in developing new law enforcement techniques. The Seventh Circuit interpreted *Sitz* to preclude local experimentation with law enforcement techniques rather than to leave states and municipal governments to explore a variety of reasonable options. That reading improperly inhibits federalism's promise of state and local flexibility and innovation, as exemplified by the City's checkpoints.

B. Even If the "Special Needs" Doctrine Governs, the City's Checkpoints Satisfy It

If, as the Seventh Circuit believed, this Court's checkpoint cases could be understood as "special needs" cases, the City's checkpoints still are constitutional. The City has special needs to check drivers' licenses and vehicle registrations and

to detect driver impairment. It makes no difference to the legality of the stops that the IPD officers simultaneously use their unaided powers of observation to detect whether motorists are engaging in other crime. Likewise, it should make no difference that the officers also lead a narcotics-detection dog around the cars' exteriors to sniff for drugs.

Yet, notwithstanding the City's sufficient "special needs" for its checkpoints, the Seventh Circuit disallowed the checkpoints because vindicating these "special needs" is not the City's primary purpose. Pet. App. 10a-11a. According to the court below, it might be different if the City's primary purpose were to check licenses and registrations or to check for driver impairment, and the dog were added as a mere afterthought. *Id.* at 10a, 11a. But because narcotics interdiction is foremost on the City's agenda, the court ruled, the City's other justifications for the checkpoints are constitutionally insufficient.[6] *Id.* at 7a, 11a.

The Court consistently has held that police officers' subjective intentions have no place in Fourth Amendment analysis. In *Whren v. United States*, 517 U.S. 806 (1996), the

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[6] For its proposition that an improper purpose destroys the checkpoints' validity, the Seventh Circuit cited dictum from the plurality opinion in *Texas v. Brown*, 460 U.S. 730 (1983), which upheld a search of an automobile based on an officer's plain-view observation of drug paraphernalia, but noted that there was no "suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered . . . ." *Id.* at 743 (plurality opinion of Rehnquist, J.). Any significance this plurality statement may initially have born was negated in *Horton v. California*, 496 U.S. 128, 141 (1990), where the Court overturned the "inadvertence" requirement of the plain-view doctrine and reduced that doctrine to a wholly objective inquiry as to whether the incriminating evidence was in plain view. And in *Whren v. United States*, 517 U.S. 806, 812 (1996), the Court rejected a "pretext" argument based solely on outdated dictum. The Seventh Circuit also cited *United States v. Ortiz*, 422 U.S. 891 (1975). *See* Pet. App. 7a. However, *Ortiz* does not even mention the "pretext" issue.

Court held that an objectively reasonable stop for a moving traffic violation was valid notwithstanding that police officers may have intended to find evidence of drug possession or trafficking. "[T]he fact that [a police] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 813 (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)) (internal quotation marks omitted). Thus, because the officers had a legitimate basis for stopping the car, any ulterior motive could not invalidate the stop, and any otherwise permissible action they may take during the stop as a result of that ulterior motive (such as to observe what is in plain view) is permissible. *See id.* at 812; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (holding that officers' drug detection motive did not invalidate an otherwise proper boat seizure conducted pursuant to suspicionless maritime document-inspection program); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (upholding suspicionless inspection of pawn shop based on the government's interest in regulating firearms and preventing violent crime, despite the consequent prosecution of pawn shop proprietor).

Recently the Court confirmed that *Whren* applies to actions police take without individualized suspicion. In *Bond v. United States*, 120 S. Ct. 1462 (2000), the Court addressed whether law enforcement officers may handle bus passengers' luggage "in an exploratory manner" without individualized suspicion of wrongdoing. *Id.* at 1465. Though declaring such government action unreasonable under the Fourth Amendment, the Court was careful to stress that its decision did *not* turn on whether the officer had a subjective law enforcement intent. Citing *Whren* and *California v. Ciraolo*, 476 U.S. 207, 212 (1986), the Court stated that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth

Amendment.* * * This principle applies to the agent's acts in this case as well; the issue is not his state of mind, but the objective effect of his actions." *Id.* at 1465 n.2. The Court thus has established that where the government articulates and pursues a legitimate interest for a suspicionless stop, courts should not look behind that interest to determine whether the government's "primary purpose" is valid.

Here, IPD officers use checkpoints to check licenses and registrations and for signs that drivers are impaired—constitutionally permissible conduct under *Sitz* and *Prouse*. The City has acknowledged that a principal purpose in operating the checkpoints is to interdict illegal narcotics. Under *United States v. Place,* 462 U.S. 696, 707 (1983), the City's use of the narcotics-detection dogs to pursue its narcotics interdiction interest is no different from the *Whren* officers' plain-view observation of the car they stopped for traffic violations. The same issue would face the Court if IPD officers merely were to pursue their interest in detecting illegal narcotics by way of a plain-view observation of stopped cars rather than by way of narcotics-detection dogs (except the checkpoints would be less effective).

Furthermore, to allow the City's admitted principal purpose of drug interdiction to invalidate the IPD's constitutionally reasonable actions would indeed lead to an "incongruous result." *See Villamonte-Marquez*, 462 U.S. at 584 n.3. The citizens of Indianapolis have elected a new mayor since the IPD last operated its checkpoints. Under the Seventh Circuit's standard, the legitimacy of future checkpoints would turn entirely on whether the new mayor and his administrative appointees have the same priorities as the prior administration, and not on what IPD officers do at the checkpoints. This is an untenable standard given the various interests that government leaders must meld in forming public policy. Often, municipal and police leaders hope to achieve multiple objectives when they authorize particular law-enforcement

activities, including checkpoints. The priorities of the mayor, the chief of police, police department supervisors, and officers on the street properly may change with each checkpoint, even though the police operate successive checkpoints in the identical manner. To require the City to "prove" that its motive is proper (or alternatively, to require a challenging plaintiff to prove that it was not) assumes a unity and solidity of purposes and motives that is unlikely ever to occur. Such an inquiry will produce results far too attenuated to be meaningful and will merely frustrate the efforts of poliee to engage in objectively reasonable law-enforcement conduct. *See Whren*, 517 U.S. at 815 (observing the difficulty of "plumb[ing] the collective consciousness of law enforcement" in determining Fourth Amendment reasonableness).

The City's checkpoints fall within the long line of cases establishing that objective reasonableness is the touchstone for Fourth Amendment compliance. *See, e.g., Bond v. United States*, 120 S. Ct. 1462, 1465 n.2 (2000); *Whren*, 517 U.S. at 812; *Graham v. Connor*, 490 U.S. 386, 397-99 (1989); *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985); *Scott*, 436 U.S. at 138; *United States v. Robinson*, 414 U.S. 218, 236 (1973). If the City pursues a legally adequate program-level justification for the checkpoints, then there is no Fourth Amendment violation. The IPD's objectively reasonable actions in checking drivers' licenses and registrations and looking for signs of driver impairment are sufficient under the "special needs" doctrine (if it applies here at all), notwithstanding that the City uses the checkpoints to achieve a primary goal of interdicting illegal drugs. *See Merrett v. Moore*, 58 F.3d 1547, 1550-51 (11th Cir. 1995), *cert. denied,* 519 U.S. 812 (1996). The Court should, therefore, analyze under the Fourth Amendment balancing test the objective conduct of the officers operating the checkpoints and conclude that the checkpoints are reasonable.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

A. SCOTT CHINN
CORPORATION COUNSEL FOR THE
CITY OF INDIANAPOLIS
Counsel of Record
ANTHONY W. OVERHOLT
OFFICE OF CORPORATION COUNSEL
Suite 1601, City-County Building
200 East Washington Street
Indianapolis, Indiana 46204
(317) 327-4055

MATTHEW R. GUTWEIN
THOMAS M. FISHER
APRIL E. SELLERS
BAKER & DANIELS
300 North Meridian
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Petitioners

May 15, 2000

No. 99-1030

Supreme Court, U.S.
FILED
JUL 5 2000
CLERK

In The
Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA,
AND BART PETERSON, IN HIS OFFICIAL CAPACITY
AS MAYOR OF THE CITY OF INDIANAPOLIS,

Petitioners,

v.

JAMES EDMOND, JOELL PALMER,
ON THEIR OWN BEHALF AND ON BEHALF OF
A CLASS OF THOSE SIMILARLY SITUATED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENTS

KENNETH J. FALK
Counsel of Record
JACQUELYN E. BOWIE
SEAN C. LEMIEUX
E. PAIGE FREITAG
CHRISTOPHER M. GIBSON
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

STEVEN R. SHAPIRO
American Civil Liberties Union
Foundation
125 Broad St.
New York, N.Y. 10004
212/549-2500
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Are traffic checkpoints where motor vehicles are stopped without cause for the primary purpose of looking for evidence of criminal drug violations unlawful under the Fourth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

1. Since August of 1998, the Indianapolis Police Department has conducted drug interdiction roadblocks in the City. (Pet. App. 25a). The roadblocks are operated pursuant to a formal policy entitled "Drug Checkpoint Contact Officer Directives by Order of the Chief of Police." (Pet. App. 53a.) The explicit purpose of the policy is to interdict the flow of unlawful drugs in Indianapolis. (Pet. App. 51a). This is done by stopping vehicles and forcing them to pass through the checkpoint areas. (Pet. App. 53a). The policy provides that officers are not given discretion to stop the vehicles out of sequence and, once selected, the driver must pass through the checkpoint. (Pet. App. 53a-54a). When the driver enters the checkpoint, an officer asks the driver for his or her license and registration. (Pet. App. 53a). The driver is informed that he or she is being stopped at a drug checkpoint. (Pet. App. 53a).

While the vehicle is stopped, officers look for signs of impairment and conduct an open view examination from outside of the vehicle. *Id.* A drug detection dog is walked around and examines every vehicle stopped. (Pet. App. 54a). If consent is given by the person in control of the vehicle, or if probable cause is ascertained by the police, a warrantless search of the stopped vehicle is conducted. (Pet. App. 53a). The policy statement indicates that "[p]robable cause is determined on the basis of whether a reasonable person would believe that seizable objects would be found in the vehicle. An indication from a trained drug detection dog would establish probable

cause." *Id.* The policy further provides that every vehicle must be examined in the same manner "until particularized suspicion or probable cause develops." (Pet. App. 54a).

There are approximately thirty (30) Indianapolis Police Department officers at each checkpoint. (Pet. App. 52a). The City attempts to operate the drug checkpoints so that, absent a search based on probable cause or reasonable suspicion, a driver will be stopped for five minutes or less. (Pet. App. 51a). In the six traffic stops in 1998 conducted before the appeal of this matter, 1,161 vehicles were stopped. (Pet. App. 55a). The police reported 55 drug related arrests "and 49 arrests for conduct unrelated to drugs, such as driving with an expired driver's license." (Pet. App. 3a, 55a).

2. The respondents, James Edmond and Joell Palmer, were stopped in two of the drug interdiction roadblocks and brought a class action lawsuit to challenge what they termed an unconstitutional seizure. (Joint App. 6, 16, 19). The respondents sought, among other things, a class-wide injunction against the roadblocks on behalf of a putative class of similarly situated drivers. (Joint App. 8). The parties thereafter entered into a stipulation as to how the City would operate the roadblocks in the future since the City indicated an intent to continue the practice. (Pet. App. 51a). The parties also stipulated that the case could proceed as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, and the trial court certified a class consisting of motorists who have been or are subject to being stopped at the drug interdiction roadblocks. (Pet. App. 30a-32a).

The respondents sought a preliminary injunction to enjoin the drug roadblocks, and the parties stipulated to all the material facts. (Pet. App. 25a-28a). The district court denied the preliminary injunction and found that the roadblocks did not violate the Fourth Amendment. (Pet. App. 32a-47a). Specifically, the trial court concluded that, although the primary purpose of the roadblocks was to interdict narcotics, the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979), must be used to assess their constitutionality and that under this test the roadblocks were proper. (Pet. App. 33a-35a).[1] The preliminary injunction was therefore denied.

3. On appeal, a divided Seventh Circuit Court of Appeals reversed the trial court. (Pet. App. 1a). Chief

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[1] The district court had noted that although the roadblocks had as a primary purpose the interdiction of drugs, they also had as a secondary purpose the checking of licenses or registrations. (Pet. App. 44a). There is nothing in the record, however, which demonstrates that the actual purpose for establishing the roadblocks had anything to do with a perceived need to check licenses and registrations. Not only is the policy formally named a "Drug Checkpoint" policy, but it makes clear that the sole purpose of the checkpoints is to stop cars so that a determination can be made if there is probable cause to search the car. (Pet. App. 53a). There is no evidence in the record that addresses any perceived need by those who established the program to conduct license and registration roadblocks. All of the evidence before the trial court concerned the City's perceived need to conduct drug roadblocks and to detect evidence of criminal drug activity. As indicated, when individuals are stopped at the checkpoints they are informed only that they are at a "drug checkpoint." (Pet. App. 53a). The fact that the program catches drivers with expired licenses or registrations is obviously incidental to its actual purpose.

Judge Posner, writing for the majority, found that the purpose of the roadblocks was "to catch drug offenders" and that the "program of drug roadblocks belongs to the genre of general programs of surveillance which invades privacy wholesale in order to discover evidence of crime." (Pet. App. 2a, 9a). The court recognized that a seizure for the purposes of general criminal law enforcement must ordinarily be based on individualized suspicion of wrongdoing. (Pet. App. 4a-5a). The court found that an exception to this general rule would apply, for example, if a roadblock were set up to catch a dangerous fleeing criminal or it were set up after police were given reliable information that a car full of dynamite was being driven by a terrorist to downtown Indianapolis. (Pet. App. 5a-6a). However, as the Seventh Circuit also recognized, neither of these exceptions apply in this case. The Seventh Circuit further noted that this Court had allowed random sobriety checkpoints in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), but the concern motivating those seizures was "not primarily with catching crooks, but rather with securing the safety or efficiency of the activity in which the people who are searched are engaged." (Pet. App. 8a). Similarly, the court of appeals distinguished the immigration checkpoints upheld in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), since they depend on the unique power of the federal government "over foreign relations, foreign commerce, citizenship and immigration." (Pet. App. 9a). Unlike immigration or sobriety checkpoints, the court of appeals concluded that the drug roadblocks in this case are designed to "catch drug offenders" and they have "no

regulatory purpose that might be compared to that of immigration laws." (Pet. App. 10a).

The Seventh Circuit acknowledged that the test for the lawfulness of a particular search or seizure is an objective one and the motives of the officers actually carrying out the search or seizure are irrelevant. (Pet. App. 10a). At the same time, the court noted that it was important to look at the purpose behind the program itself. As Judge Posner explained, a constitutional roadblock cannot be a pretext to conduct a search for criminals, but must have an actual regulatory purpose. *Id.* The inquiry into purpose, at the program level, is a valid and necessary method "of identifying and banning the most flagrantly abusive governmental conduct without handcuffing government altogether." (Pet. App. 11a). Since the roadblocks have a general criminal law enforcement purpose, the court of appeals concluded that the trial court had erred in finding that the City's practice was lawful.

Dissenting from the panel's opinion, Judge Easterbrook argued that the purpose of the roadblock policy was not relevant to the Fourth Amendment analysis. (Pet. App. 13a-16a). He rejected the criminal investigatory-regulatory distinction and instead argued that the roadblocks were constitutional because the diminished privacy interests of the drivers and the slight invasion of privacy posed by the roadblocks were outweighed by the aggregate success of the roadblocks and the limited discretion given to the officers handling the roadblocks. (Pet. App. 16a-20a).

SUMMARY OF THE ARGUMENT

I. The stopping of a car at a roadblock is a seizure under the Fourth Amendment. *Michigan Department of State Police v. Sitz, supra; United States v. Martinez-Fuerte, supra.* This Court has always required that a seizure or search be supported by cause to be valid under the Fourth Amendment if its primary purpose is investigation of a crime. In *Sitz* and *Martinez-Fuerte* this Court approved of, respectively, sobriety checkpoints and fixed immigration checkpoints. Both featured suspicionless seizures and are therefore limited exceptions to the general rule that searches or seizures must be supported by individual cause. However, the two cases do not create a "checkpoint exception" to the Fourth Amendment and do not mark a deviation from this Court's consistent holdings that if the purpose of a search or seizure is to discover evidence of criminal activity, it must be supported by cause. Neither *Sitz* nor *Martinez-Fuerte* involved searches or seizures designed to investigate criminal activity. Conversely, the roadblocks here are clearly designed to discover evidence of criminal drug activity. Since these criminal investigatory seizures are not based on cause, they are unconstitutional.

A. This Court has recognized limited exceptions to the requirement that searches or seizures be predicated on cause. However, in each situation warranting an exception, the seizures or searches were not designed to elicit evidence of criminal activity, although criminal activity might be discovered during their course. The first such exception involves administrative or regulatory searches which may, under appropriate circumstances, occur without specific cause. Although these searches

might disclose evidence of criminal activity, their purpose is not to investigate crime but to prevent the development of hazardous conditions or to protect other regulatory interests. Similarly, searches of the property of persons who have been arrested may occur without cause. These inventory searches are not for purposes of criminal investigation, however, but are designed to advance non-investigatory interests. Also within the well-recognized exception to the cause requirement are drug tests based on special governmental needs separate from criminal investigation.

Immigration checkpoints fall within the non-criminal investigatory model as well. Prior to *Martinez-Fuerte*, immigration checkpoints were recognized as being undertaken primarily for non-prosecutorial purposes as part of the federal government's acknowledged interest in protecting its sovereign territory. Nothing in *Martinez-Fuerte* alters that view or the Fourth Amendment analysis that flows from it. The Court in *Martinez-Fuerte* found that the fixed checkpoints could be undertaken without cause after employing a balancing test that weighed the interest of the government against the privacy interest of the citizen. But, the validity of that balancing test rested on the Court's recognition that the government's interest was not to investigate criminal activity, but to safeguard our borders and to minimize illegal immigration.

The balancing test used in *Martinez-Fuerte* was formalized in *Brown v. Texas, supra*. However, this Court has never applied the *Brown* balancing test when the challenged search or seizure was for the purpose of investigating and prosecuting criminal activity. Thus, the sobriety checkpoints in *Sitz* were not designed for the

investigation of criminal activity; rather, they were viewed by this Court as non-criminal, safety-related inspections designed to remove from the road imminently dangerous drivers and their vehicles. Thus, *Sitz* merely conforms to this Court's existing precedents allowing non-cause based seizures or searches if the purpose of the search or seizure is not to investigate potential criminal activity.

B. The subjective intent of an individual officer is irrelevant under the Fourth Amendment if there is objective cause to believe that a violation of law has occurred. However, in a search or seizure which is not based on cause, programmatic purpose must be examined to determine if a suspicionless search or seizure, characterized as non-investigatory, is actually an unconstitutional attempt to conduct a criminal investigation.

C. The City's argument in favor of these roadblocks essentially serves to create a new exception to the Fourth Amendment for checkpoints because of the serious concerns that drugs pose in America today. However, this Court has repeatedly rejected that approach to Fourth Amendment law, most recently when the Court refused to create a "firearms exception" to stop-and-frisk rules earlier this Term in *Florida v. J.L.*, ___ U.S. ___, 120 S.Ct. 1375 (2000). As the Court has recognized, such exceptions would quickly undermine the core requirement of cause embodied in the Fourth Amendment and would quickly undermine the Fourth Amendment itself. There simply is no valid reason for the Court to back away from its consistent position that criminal investigatory seizures and searches may occur only after some quantum of cause is present.

D. The Indianapolis roadblocks are concerned with one thing, and only one thing – the discovery of evidence of criminal drug activity. The roadblocks do not protect the public safety on the roadways as do vehicle inspections and sobriety checkpoints. The purpose of the roadblocks is to find probable cause to conduct searches to discover unlawful drugs. Although the City claims that there is a secondary purpose for the roadblocks, to regulate public safety through license and registration checks, there is nothing in the record, other than the fact that licenses and registrations are checked while plain view inspections are done and drug detection dogs sniff each car, to support a claim that the City is actually interested in anything but drug interdiction. The City has not attempted to demonstrate that the standards of *Brown v. Texas* are met with regard to any secondary purposes related to traffic safety. It is indisputable, therefore, on the record before the Court, that the sole programmatic purpose of the roadblocks is to look for drugs. The roadblocks are therefore unconstitutional because they are not supported by cause.

II. Even if the *Brown* balancing test were to be applied to the drug interdiction features of the roadblocks, they would be found unconstitutional. These roadblocks rely on a large police presence and dogs circling each car. As a result, they represent a much greater intrusion, both subjectively and objectively, on law abiding motorists who are unfortunate enough to be stopped than the roadblocks in either *Sitz* or *Martinez-Fuerte*.

ARGUMENT

I. THE CITY'S DRUG INTERDICTION ROADBLOCKS ARE UNCONSTITUTIONAL SINCE THEY HAVE AS THEIR PRIMARY, IF NOT SOLE, PURPOSE THE INTERDICTION OF UNLAWFUL DRUGS

The stopping of a car at a roadblock is a seizure under the Fourth Amendment. *See, e.g., Sitz*, 496 U.S. at 450; *Martinez-Fuerte*, 428 U.S. at 556. The Fourth Amendment arose out of an English and colonial history of general searches without any specific cause. *See generally*, Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L.Rev. 925, 939-950 (1998). From this history of abusive, non-cause based searches, came the desire of the Founders to enact a prohibition that would ensure the right to be free from unreasonable searches and seizures. *Id.* Searches and seizures without cause are thus presumptively unconstitutional. "[T]o accommodate the interests protected and advanced by the Fourth Amendment some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *Martinez-Fuerte*, 428 U.S. at 560.

Although this Court has allowed, in limited circumstances, certain seizures or searches to occur without individualized cause, it has consistently ruled that individual suspicion must be present if a search or seizure is designed for the primary purpose of criminal investigation. Because the drug roadblocks in this case were designed for the primary, if not exclusive, purpose of criminal investigation, they cannot be constitutionally justified without erasing the clear and critical line between criminal and non-criminal stops and searches

that this Court has repeatedly drawn in its Fourth Amendment case law.

A. This Court has removed the cause requirement only if the search or seizure is not designed to disclose evidence of criminal activity, even though such disclosure may be a by-product of the search or seizure

A search or seizure must generally be based on some degree of specific cause to be constitutional. Since 1967, this Court has recognized limited exceptions to this general rule. Each exception is characterized by the fact that the seizures or searches were not designed to elicit evidence of criminal activity, although criminal activity may have legitimately been discovered during the search or seizure. That fact is essential to understanding this Court's jurisprudence, and it is dispositive in this case.

1. Administrative and regulatory searches

In *Camara v. Municipal Court*, 387 U.S. 523, 531 (1967), administrative inspections to enforce building codes were upheld based on administrative warrants which were not supported by specific cause. In doing so, the Court recognized that violations of the codes in question could be criminal violations as well. *Id.* However, the Court also recognized that the search was not a criminal investigatory search:

> Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with

> minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety.

Id. Even though cause was not required, moreover, Fourth Amendment interests were safeguarded by the requirement that an administrative warrant be obtained. 387 U.S. at 538-39.[2]

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[2] The City argues that *Camara* rejected the distinction between regulatory searches and criminal ones. (Petitioner's Brief at 28, n. 4). Yet, *Camara* clearly holds that an administrative search without individual suspicion is appropriate, whereas a search for criminal investigatory purposes is not, despite the fact that the administrative search may turn up evidence of criminal violation. 387 U.S. at 531. The notion that a regulatory, as opposed to a criminal investigatory, search does not have to be supported by cause was accepted at the time of the adoption of the Fourth Amendment. Thus, in *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983), this Court found that customs officials were allowed, without cause, to board vessels to review the vessel's documents and manifest in furtherance of the government's interest in "assuring compliance with documentation requirements." The Court noted that the current statute allowing such an inspection is a direct descendant of the Act of August 4, 1790, ch. 35, 1 Stat. 145, § 31. 462 U.S. at 584. The immediate predecessor of the 1790 statute was the Collection Act of 1789, ch. 5, 1 Stat. 29, *repealed by* Act of August 4, 1790, ch. 35, § 74, 1 Stat. 145, 178, which also allowed inspectors to board ships when they arrived in port and allowed them to check inventory to create an administrative record so that, when the goods were unloaded, duties could be imposed. Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1739-40 and note 113 (1996) (reviewing WILLIAM JOHN CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING). As one commentator has explained, these inspections "would be classified today as administrative

Although *Camara* required the issuance of an administrative warrant, subsequent cases have emphasized that there are times when a search may occur pursuant to a regulatory or administrative scheme, even without a warrant. Thus, in *Michigan v. Tyler*, 436 U.S. 499 (1978), the exigency of the need to fight a fire was deemed to be sufficient to allow the warrantless entry of fire officials into a building and to allow them to remain there for a reasonable time after the blaze was extinguished in order to investigate the cause of the fire. 436 U.S. at 512. However, the *Tyler* Court also emphasized that if officials concluded that there was probable cause to believe the fire was arson, a warrant would have to be obtained for further searches under the traditional probable cause standard. *Id.* The limited nature of this exception from the cause requirement was reemphasized in *Michigan v. Clifford*, 464 U.S. 287 (1984), where the Court drew a clear distinction between the search of a fire scene to discover evidence of arson and the search of a fire scene to determine the cause of the fire. The former is an investigatory search that requires a criminal search warrant based on probable cause; the latter is a regulatory search that can be supported by an administrative warrant issued without individualized cause. 464 U.S. at 294. The difference

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searches and seizures, and required neither warrants nor particularized suspicion." *Id.* at 1740. By contrast, another portion of the 1789 Act provided that a warrantless search of ships could occur only if customs officials had reasonable suspicion that taxable property was concealed which would be a violation of law. *Id.* at 1740-41 and at n. 118. This corresponds to the modern day search or seizure for criminal investigatory purposes.

between investigatory and regulatory invasions of Fourth Amendment interests has been crucial to the Court, and it is crucial here.

2. Inventory searches

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), this Court found that inventory searches following the lawful seizures of automobiles were not unconstitutional, even though the searches are done without specific cause and without a warrant. The Court noted that these searches were not motivated by a criminal investigatory purpose, but were instead designed for the non-investigatory purposes of protecting the owner's property, protecting the police from claims that property had been lost or stolen, and protecting the police from potential danger. 428 U.S. at 369. "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions . . . " 428 U.S. at 370, n. 5.

The Court noted that the inventory search in *Opperman* was reasonable since it was done pursuant to standard police procedures. However, the Court reiterated that this standard police procedure must be related to the inventory search and not be related to a search for evidence of wrongdoing. Likewise, in *Colorado v. Bertine*, 479 U.S. 367, 376 (1987), the Court upheld an inventory search of an arrestee's backpack that was permitted, but not required, by police regulations. The inventory search did not violate the Fourth Amendment, the Court ruled, as

long as the police discretion "is exercised according to standard criteria and on the basis of something other than suspicion of criminal activity." *Id.* In this area, as well, the Court has drawn a bright line between criminal investigatory and non-investigatory searches and seizures.

3. Special needs drug testing

A clear demarcation between criminal investigatory searches and seizures, which require cause, and non-criminal ones, which do not, can also be seen in the special needs drug cases. Beginning in *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989), this Court has held that there are certain situations in which public entities may require individuals to submit to suspicionless drug tests. *See also, Vernonia School District 47 J v. Acton*, 515 U.S. 646 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). The Court stated in *Skinner* that suspicionless drug testing could be allowed when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 489 U.S. at 619 (internal quotation marks and citation omitted). To determine if the suspicionless testing could be justified, the Court employed a balancing test which looked at the interests of the government, the nature of the intrusion, and the privacy interests implicated. 489 U.S. at 417-22. But, the seizure and search under the Fourth Amendment could only legitimately take place if it was designed for a purpose other than normal law enforcement and, even

then, there are limits on who may be subject to such tests. *See, Chandler v. Miller*, 520 U.S. 305 (1997).[3]

4. Immigration checkpoints

In *Martinez-Fuerte*, the Court permitted immigration checkpoints which had as their purpose the brief stopping of vehicles to determine compliance with immigration laws. The Court recognized that the stopping of the vehicles were seizures that had to be justified under the Fourth Amendment. 428 U.S. at 558. However, after employing a test that balanced the individual's privacy interests and the imposition on those interests against the government's need for the seizure, the Court found that the roadblocks could occur even though not supported by individual suspicion. 428 U.S. at 562.

The City argues that *Martinez-Fuerte* stands for the proposition that a checkpoint can occur if the needs of the government balanced against the invasion of the privacy interest of the citizen tips in favor of the government. However, the City's argument ignores the fact that *Martinez-Fuerte* focused on the purpose behind the proposed stops, which the Court described as "legitimate and in the public interest . . . " *Id. Martinez-Fuerte* arose in the particularized context of immigration control where the

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[3] In its Brief, the City seems to argue that the special needs cases are not relevant here since they deal with searches and not "low-intensity" seizures. (Petitioner's Brief at 27). It is true that the special needs cases concern searches. But, even in "low-intensity" seizures, this Court has always required at least reasonable suspicion if the seizure is for the purpose of criminal investigation. *Terry v. Ohio*, 392 U.S. 1 (1968).

government's overriding interest is in preserving the integrity of its borders. It is true that those who violated the border controls were subject to arrest and prosecution, just as those who violate other regulatory rules of the state may be subject to arrest and prosecution. But what distinguishes regulatory searches or seizures from criminal ones is that criminal prosecution is not the principal or ultimate goal of the program. Those caught in the roadblocks in *Martinez-Fuerte*, whether prosecuted or not, had committed crimes, but the purpose of the checkpoints was to "minimize illegal immigration" and most illegal aliens who were caught were simply deported. 428 U.S. at 552, 553, n. 9.[4]

This Court has long recognized the distinction between stopping a vehicle without cause, in the hope of finding evidence of criminal activity, and stopping persons "crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in . . . " *Carroll v. United States*, 267 U.S. 132, 153-54 (1925).[5] As

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[4] It is also true, as noted by the United States (Brief of the United States at 20) that the checkpoints in *Martinez-Fuerte* took place some distance from the border. However, this does not change the fact that they are maintained to intercept illegal immigrants. ("Traffic-checking operations in the interior apprehended approximately 55,300 more deportable aliens.") 428 U.S. at 553.

[5] The Court in *Martinez-Fuerte* recognized that the stopping of vehicles at immigration checkpoints was similar to stopping vehicles on the highways to check for valid licenses and compliance with other safety requirements. The latter stops were deemed to be "administrative," although this characterization did not serve to determine if the stops were too

Justice Powell had noted three years prior to *Martinez-Fuerte*, immigration checkpoints are "undertaken primarily for administrative rather than prosecutorial purposes." *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973) (Powell, J., concurring). After *Martinez-Fuerte*, the Court has continued to recognize that there is a significant difference under the Fourth Amendment between an inspection designed to elicit evidence of criminal activity and the authority of the United States to conduct a search or seizure based "on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry." *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 473 (1979). Thus, in *Torres*, the Court found unconstitutional a search of luggage that had occurred without cause and that was based on a Puerto Rico statute allowing police to search the luggage of any person arriving from the United States. The immigration search exception could not apply, the Court held, since Puerto Rico, a territory of the United States, "has no sovereign authority to prohibit entry into its territory." *Id.*[6]

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intrusive, a question the Court declined to answer. 428 U.S. at 560, n. 14. This footnote does not, as argued by the United States, represent a rejection of the distinction between searches and seizures for the purposes of criminal investigation and those for other, non-criminal purposes. (Brief of the United States at 20). It merely acknowledges that the immigration stops are administrative in nature.

[6] The City asserts that the Seventh Circuit misread *Martinez-Fuerte* by indicating that the decision relied on Congress' authority over the regulation of foreign commerce,

The immigration cases therefore do not provide that a balancing test is to be used to judge the constitutionality of all searches or seizures. Rather, this balancing test applies only if the aim of the immigration program is not directed at criminal law enforcement.

5. Drunk driving roadblocks and traffic safety checkpoints

In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court suggested that states could operate traffic checkpoints, featuring suspicionless stopping of vehicles, in a constitutional manner if they were designed for the regulatory, non-investigatory purpose of insuring traffic safety through checking driver and vehicle compliance with licensing, registration and inspection requirements. All these requirements, the Court observed, "are essential elements in a highway safety program." *Id.* The Court nonetheless found that the random stopping of Mr. Prouse was unconstitutional since it had not been done pursuant to a neutral plan, and had not been done in a roadblock setting where officer discretion was circumscribed and where the invasion of privacy interests was minimized.

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citizenship and immigration. (Petitioner's Brief at 25). Nowhere did the Seventh Circuit imply or state that Congress' immigration power allowed an overriding of the Fourth Amendment. Instead, the Seventh Circuit correctly found that Congress' authority in this area created a valid, non-criminal reason for the immigration stops. As indicated above, this finding conforms to the law from this Court.

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.

440 U.S. at 663. Thus, the Court noted, its holding was not intended to "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection . . . " 440 U.S. at 663, n. 26. This qualification merely reflects, however, the Court's longstanding distinction between investigatory and regulatory stops, although even the latter are subject to a balancing test under the Fourth Amendment.

The balancing test to be applied to these regulatory/safety seizures was supplied in *Brown v. Texas, supra*, and is not appreciably different than the balancing test applied in the immigration cases or in the special needs cases. In *Brown*, the defendant had been stopped by police while on the street because he looked suspicious, and he was then arrested for refusing to identify himself. The Court held that:

> [t]he reasonableness of seizures that are less intrusive than a traditional arrest, *see Dunaway*

> *v. New York . . . Terry v. Ohio* . . . depends " 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " *Pennsylvania v. Mimms*, 434 U.S. 106, 109 . . . (1977); *United States v. Brignini-Ponce* . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interests, and the severity and interference with individual liberty.

443 U.S. at 50-51. This is hardly a blueprint for a standard allowing searches or seizures without cause. Indeed, each case cited by the Court involves the imposition of the general requirement that the search or seizure occur with some degree of cause.[7] As this Court stated in *Brown*, to ensure that the individual's expectation of privacy is not subject to discretionless invasion by police officers:

> the Fourth Amendment requires that a seizure must be based on specific, objective, facts indicating that society's legitimate interests require the seizure of the particular individual, or that

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[7] In *Dunaway v. New York*, 442 U.S. 200 (1979), an arrest and subsequent confession were found unconstitutional because the defendant had been arrested without probable cause. *Terry*, of course, requires some individual suspicion to ensure that a seizure does not run afoul of the Fourth Amendment. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court affirmed a conviction for firearm possession after the firearm was discovered during a lawful *Terry* pat down. Finally, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court reversed a conviction that occurred after a roving border patrol stopped a vehicle without cause or suspicion other than the occupant's apparent Mexican heritage. Reasonable suspicion was required to justify the stop. 422 U.S. at 881-82.

> the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

443 U.S. at 51.

Although *Brown*, like *Martinez-Fuerte*, discussed the possibility of conducting a search or seizure pursuant to a plan embodying neutral criteria, the case did not allow these types of intrusions to occur if their purpose was to investigate criminal activity. Indeed, in *Brown* the Court invalidated the conviction because the stop had not been supported by cause.

Subsequently, in *Sitz*, this Court found that cause was not a necessary predicate for the seizures of vehicles at a sobriety checkpoint. The stops in that case were solely for the purpose of a brief sobriety check, taking, on average, 25 seconds. 496 U.S. at 448. The City argues that these were criminal investigatory checkpoints, but sobriety checkpoints are more properly viewed as having a non-criminal investigatory purpose. Although drunk driving is a criminal offense, the Court emphasized that the state's interest was not in investigating criminal activity; rather, "the State's interest [was] in preventing drunken driving." 496 U.S. at 455. The need to keep imminently unsafe drivers off of the road is a non-criminal investigatory interest in the same way as inspecting cars to ensure safe vehicular operation is a non-criminal investigatory interest.

In determining the constitutionality of the sobriety checkpoints in *Sitz*, this Court utilized the balancing test of *Brown v. Texas, supra*, and focused on the State's interest in preventing drunk driving, the extent to which the

roadblocks further that interest, and the degree of intrusion the roadblocks pose for those stopped. 496 U.S. at 455. In doing so, this Court explicitly stated that it would not engraft onto the *Brown* balancing test the special needs analysis of *National Treasury Employees v. Von Raab, supra*. But, the City's argument that there is no need to show any individual cause or suspicion for any roadblock, provided it otherwise meets the balancing test of *Brown*, is wrong. *Sitz* does not authorize police stops which are designed solely or primarily for purposes of normal police investigation. *Sitz* did not create a "checkpoint exception" applicable where the checkpoint is designed to discover evidence of criminal activity. Given that this Court has never allowed a suspicionless search to be undertaken for criminal investigation, the Seventh Circuit was correct in limiting *Sitz* to its specific facts; sobriety checkpoints which have as their purpose traffic safety and not police investigation.

Sitz therefore conforms to the many cases cited above that differentiate between criminal investigatory searches and those which have other purposes. As the Seventh Circuit noted "the concern which lies behind the randomized or comprehensive systems of inspections or searches that have survived challenge under the Fourth Amendment is not primarily with catching crooks, but with securing the safety or efficiency of the activity in which the people who are searched are engaged." (Pet. App. 8a).

This Court has never authorized a general "checkpoint exception" to the Fourth Amendment. In *Chandler v. Miller*, 520 U.S. at 308, the Court reaffirmed that:

> Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in "certain limited circumstances." *See Treasury Employees v. Von Raab*, 489 U.S. 656, 668 . . . (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, *United States v. Martinez-Fuerte* . . . , or a sobriety checkpoint, *Michigan Department of State Police v. Sitz*.

Martinez-Fuerte and *Sitz* are properly recognized as two separate types of limited exceptions to general Fourth Amendment requirements and not as examples of an overarching "checkpoint" exception.

The City's argument that there should be a checkpoint exception appears to be based on its claim that motorists have a diminished expectation of privacy in their automobiles. This argument is flawed. First, a diminished expectation of privacy does not translate into no expectation of privacy. Nor could it, given that this Court has consistently recognized that "[a] citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." *New York v. Class*, 475 U.S. 106, 112 (1986).[8] Because a person retains the protections of the Fourth Amendment while driving through Indianapolis, it is inappropriate to deviate from this Court's clear precedents demanding that cause exist to

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[8] The often mentioned "automobile exception" is not an exception to the cause requirement for searches or seizures. Instead, it is an exception to the warrant requirement, but only in circumstances where probable cause exists. *Maryland v. Dyson*, 527 U.S. 465 (1999); *California v. Carney*, 471 U.S. 386 (1985); *Carroll v. United States, supra.*

effect a search or seizure, unless the search or seizure is not for the purpose of criminal investigation.

Second, the argument that the diminished interest in privacy of automobile drivers allows for the creation of a checkpoint exception to the Fourth Amendment suffers from a conceptual problem as well. In *Brown*, this Court emphasized that the balancing test might be appropriate, not because of a diminished expectation of privacy, but if a seizure is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of officers." 443 U.S. at 51. The significance of a diminished expectation of privacy comes into play, not in deciding whether the *Brown* test is to be used, but in determining "the severity of the interference with individual liberty" once it is determined that the *Brown* test is appropriate. *Id.* Therefore, before the question can be answered as to whether a diminished expectation of privacy is relevant, the question must be asked if it is appropriate to use the *Brown* test at all. And, the determinative factor in deciding whether or not to use the balancing test is whether the search or seizure is for purposes of criminal investigation.

B. This Court has repeatedly recognized that, because of the distinction between criminal investigatory seizures and searches and administrative/regulatory seizures and searches, a criminal investigatory motive may render a search or seizure invalid if it is performed without cause

It is, of course, true that "the subjective intent of the law enforcement officer is irrelevant in determining

whether that officer's actions violate the Fourth Amendment." *Bond v. United States*, ___ U.S. ___, 120 S.Ct. 1462, 1465, n. 2 (2000). However, as this Court noted in *Whren v. United States*, 517 U.S. 806, 811 (1996), this principle only applies to "police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred." If probable cause is present, the subjective intentions of the individual officers are not relevant. *Id., see also, Ohio v. Robinette*, 519 U.S. 33 (1996). The Court further explained that "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes." *Whren*, 517 U.S. at 811-12. The City fails to come to grips with this Court's repeated rulings that a suspicionless search characterized as non-investigatory will be rendered unconstitutional if it is a programmatic subterfuge for criminal investigation. The purpose inquiry is one which must be made.

The importance of programmatic purpose was made clear in *New York v. Burger*, 482 U.S. 691 (1987), where this Court held constitutional a New York statute authorizing warrantless and suspicionless searches of auto junkyards. The Court noted that the statute had a clear regulatory purpose of seeking to ensure that the regulated businesses were legitimate and that the statute was not a " 'pretext' to enable law enforcement authorities to gather evidence of penal law violations." 482 U.S. at 716, n. 27. Although the Court recognized that the officer may discover evidence of a crime in the course of the regulatory searches, it held that, in the absence of any programmatic pretext, "[t]he discovery of evidence of crimes in the

course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect." 482 U.S. at 716.

In *South Dakota v. Opperman, supra,* a routine inventory search was conducted of the defendant's automobile after it had been impounded for traffic violations, and marihuana was found. This Court found that the warrantless and suspicionless search was a proper inventory search because "there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." 428 U.S. at 376. The Court recognized that it was appropriate to look at the programmatic purpose in deciding whether the Fourth Amendment requires cause (for an investigatory seizure or search) or whether a suspicionless search (for inventory/regulatory seizures or searches) is permissible. Similarly, in *Colorado v. Bertine, supra,* an inventory search that disclosed narcotics was upheld because "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." 479 U.S. at 372.

In *Michigan v. Clifford, supra,* the Court noted, in differentiating between an administrative search, based on the exigency of a fire, and a caused-based criminal investigatory search, that "[t]he object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined." 464 U.S. at 294. This, of necessity, requires that the court determine, among other things, "whether the object of the

search is to determine the cause of the fire or to gather evidence of criminal activity." 464 U.S. at 293.

The necessity of looking at the purpose for the search or seizure was also emphasized in *Texas v. Brown*, 460 U.S. 730 (1983), where the issue was whether evidence of criminal activity had properly been discovered as being in "plain view." The individual had been stopped at a driver's license checkpoint, and the police officer noticed a balloon in the driver's hand that appeared to contain narcotics. While the driver was looking in his glove compartment for his license, the officer, standing outside the car, shifted his position to obtain a better view of what was inside the car and noticed contraband. A plurality of this Court found that the plain view doctrine properly applied and the Fourth Amendment, therefore, did not preclude the seizure. However, then Justice Rehnquist, in his plurality opinion, noted that "the circumstances of this meeting between [Officer] Maples and [defendant] Brown give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." 460 U.S. at 743.[9]

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[9] The City and the United States argue that this element of *Texas v. Brown* is no longer valid since *Horton v. California*, 496 U.S. 128 (1990), did away with the "inadvertence" requirement under the plain view doctrine. This misses the point. Regardless of whether the item was discovered inadvertently or not, the plurality in *Texas v. Brown* recognized that it was necessary to look at the programmatic purpose of the roadblock to determine if the program itself was a pretext to discover evidence of criminal law violations.

This Court's case law therefore establishes two clear principles. First, a criminal investigatory search or seizure must be supported by cause, although one that is not directed to criminal investigation, like a regulatory, administrative, or safety seizure or search, need not be supported by cause, provided it satisfies a balancing standard. Secondly, and as a necessary corollary to the first principle, the programmatic purpose of the search or seizure must be examined to determine which Fourth Amendment standard applies. Thus, although the motive of the individual officer conducting the search or seizure is not relevant for Fourth Amendment purposes, the Fourth Amendment demands an examination of the overall purpose of the government program to determine if the search or seizure can properly be deemed to be regulatory or investigatory so a determination can be made as to whether the general requirement of cause can be eliminated. And, as the above citations make clear, this Court has not shrunk from the task of requiring lower courts to discern whether the search or seizure's primary purpose is to detect evidence of criminal activity or whether it is designed to serve a purpose that is not related to criminal investigation.

C. Allowing the propriety of the drug interdiction roadblocks in this case to be measured through the balancing test of *Brown v. Texas* would not only be unprecedented, but would seriously undermine the Fourth Amendment

The argument of the City and its *amici curiae*, stripped to its bare essentials, is that a checkpoint exception to the Fourth Amendment must be created because

drugs are such a serious concern in America today that there must be some leeway given to allow what they term to be relatively non-invasive seizures to stop drug trafficking. In addition to destroying any privacy interest that citizens have in their automobiles, the argument risks an even more dangerous precedent. In *Torres v. Commonwealth of Puerto Rico, supra,* the Court quickly dispensed with a similar argument raised by Puerto Rico to justify the constitutionality of its statute allowing it to search the luggage of travelers from the United States without individualized suspicion.

> Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement.

442 U.S. at 474-74.

In *Richards v. Wisconsin,* 520 U.S. 385 (1997), this Court likewise refused to create a blanket exception to the "knock and announce rule" prior to police entry of a dwelling for entries involving felony drug investigations. The basis for the argued exception was the nature of the current drug culture, its reliance on weapons and the possibility of destruction of the drugs involved. The Court resisted the invitation noting that:

> [i]t is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for privacy of persons and the inviolability of their property that existed when the provision was adopted – even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.' " *Minnesota v. Dickerson*, 508 U.S. 366, 380 . . . (1993) (Scalia, J., concurring).

520 U.S. at 392, n. 4. The Court found that it was problematic to create one exception since the exception can quickly obliterate the rule. 520 U.S. at 393-94.

The Court made the same point more recently in *Florida v. J.L., supra*, when it rejected an argument raised by both the State of Florida and the United States that the standard analysis under *Terry* should be modified to allow a search based on reduced cause if a gun was involved. "Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing." ___ U.S. at ___, 120 S.Ct. at 1379. Such an exception would be problematic for a number of reasons, the Court noted, including the fact that " 'the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others,' thus allowing the exception to swallow the rule." ___ U.S. ___, 120 S.Ct. at 1380, *quoting, Richards v. Wisconsin*, 520 U.S. at 393-94.

The United States argues that this concern, which was also expressed by the Seventh Circuit, is misplaced

because, in the estimation of the United States, there will be no abuse if the police adhere to objective limitations on checkpoints. (Brief of United States at 27). The United States additionally contends that roadblocks would, of necessity, be limited because "[t]here is also a practical limitation both on what crimes have a sufficiently pervasive connection to the roadways to make it sensible to commit law-enforcement resources to checkpoints and what crimes can be policed effectively through plain view inspections or canine sniffs . . . " *Id.* at 28. However, the United States cannot mean that objective limitations sanction any and all searches and seizures. This would be the end of any requirement for individualized cause or suspicion under the Fourth Amendment. Yet, it is clear that the checkpoint exception argued for by the City and its *amici curiae* is not limited in any way other than by the product of the balancing test demanded by *Brown*. Under the City's argument, if the government entity's interests are high enough, and the privacy incursion is deemed to be small enough, then the seizure or search will be allowed if a court finds a connection between the seizure or search and the public interest. Adoption of the argument urged by the City will lead to all manner of seizures and searches unrelated to motor vehicles since there is nothing inherent in the balancing test which serves to limit it to motor vehicles.[10] The balancing test urged by the City

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[10] The possibilities are not limited by crimes which have a pervasive connection with roadways. Obviously, drunk driving has a pervasive connection with driving. However, drug smuggling does not have the same direct connection.

> Unlike operating while under the influence, trafficking in illegal narcotics involves a wide variety

would allow, for example, routine pedestrian stops and dog sniffs by drug detection dogs in neighborhoods known to have a large amount of drug trafficking. The possibilities are endless.

The argument of the City and the United States must be rejected here. The response to the problem of drugs in this country cannot be a retreat from the Fourth Amendment. This Court's jurisprudence on that point is clear – a criminal investigatory search or seizure must be supported by some quantum of cause. The seriousness of the concern here cannot be the reason to abandon this jurisprudence or, what are now exceptions to the Fourth Amendment could quickly become the rule.

> of transportation modes . . . Thus, narcotics interdiction is not inextricably connected with the public's use of the roads. . . .
>
> The nature of the harm caused by drug trafficking also differs from that caused by drivers operating while under the influence. The drug problem in the UnitedStates is certainly grave . . . However, the risk that narcotics trafficking poses to the public is not immediate, as is the risk posed by a person operating while under the influence.

Commonwealth v. Rodriguez, 722 N.E.2d 429, 434 (Mass. 2000). If the balancing test is the rule, there is no reason to limit the seizures to car situations.

D. The Indianapolis drug interdiction roadblocks are unconstitutional because their purpose is to seize drivers without suspicion in an attempt to discover evidence of criminal activity

As the Court of Appeals noted, "Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime." (Pet. App. 9a). Indianapolis is not claiming that drug interdiction roadblocks are necessary to remove unsafe drivers or unsafe vehicles. The City's purpose is not to regulate traffic. The roadblocks are, instead, criminal investigatory stops. The purpose of the stops is to discover probable cause to conduct searches to discover the unlawful possession of drugs. The ultimate goal is to detect drug traffickers. (Pet. App. 57a).

The City concedes that the principal purpose of the checkpoints is to interdict illegal narcotics. (Petitioner's Brief at 34). However, the City argues that the checkpoints have a valid secondary purpose of checking licenses and registrations and that this purported regulatory purpose makes the checkpoints valid under the balancing test of *Brown v. Texas*. Of course, this argument presupposes two circumstances which are not present here: 1) that there is actually, as a matter of fact, a valid secondary purpose to the roadblocks; and 2) that the test of *Brown v. Texas* is met with regard to a secondary, regulatory, purpose of checking licenses and registrations. Neither circumstance is present.

As indicated above, *see* note 1, *supra*, there is absolutely nothing in the record to indicate that the City of Indianapolis has any purpose for the roadblocks other than the detection of crime. It is true that licenses are checked during the stop, and persons are examined for signs of impairment. But, there is no evidence that these procedures are anything but parts of the scheme to keep drivers seized while attempts are made to develop probable cause to conduct searches for drugs. Accordingly, while the drivers are stopped, a drug-sniffing dog is deployed around each vehicle. Even if licenses and registrations have been checked and drivers have been examined, the drivers cannot leave, since as the policy proclaims in large type: "A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE *EVERY* VEHICLE STOPPED AT THE CHECKPOINT." (Pet. App. 54a). As the Seventh Circuit noted, "[l]eading a drug-sniffing dog around a car cannot be justified by reference to a desire to detect traffic violations, and so the use of the dog at the City's roadblocks shows – what is anyway not contested – that the purpose of the roadblocks is to catch drug offenders." (Pet. App. 11a).

The purpose of the roadblocks is therefore clear – to find and catch criminals. Nevertheless, the City argues that the test uniformly demanded by this Court's prior cases, which looks to the purpose of the seizure or search before determining whether cause is required or whether the *Brown* balancing test may be utilized, is too demanding and difficult a standard since it demands an inquiry into the mental state of those establishing the program. However, such a metaphysical inquiry is hardly necessary. It is clear in this case from the public statements

governing the creation of the roadblock program and the operation of the roadblocks themselves, that the purpose of Indianapolis' roadblocks is to look for drugs. In *Michigan v. Clifford*, as noted above, this Court indicated that the question of whether law enforcement authorities have a criminal investigatory or regulatory purpose is crucial for determining if a search can proceed without probable cause. The object of the search in *Clifford* was determined, not by looking into the thought processes of those involved, but by reaching reasonable conclusions based on the evidence before the Court. 464 U.S. at 649. ("Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson.") Similarly, no inquiry into mental state is necessary here. If the overriding purpose of the seizure or search is for purposes of criminal investigation, it must be supported by individual cause.

Even if there were facts which indicated that the City's drug roadblocks had a valid secondary purpose which was regulatory in some sense, the roadblocks would, at a minimum, have to satisfy the balancing test of *Brown v. Texas* as to this secondary purpose. To meet that test, the City must establish that license and registration issues are a serious public concern in Indianapolis, that the program is designed to address that concern, and that it does so in a way that does not unduly intrude on the privacy interest of the City's drivers. *Brown*, 443 U.S. at 50-51. The City has not only failed to make that showing on this record, it has not even attempted to do so except through conclusory references to traffic safety as a

"special need." (Petitioner's Brief at 31-32).[11] This cannot suffice, even under *Brown*. The checkpoints here simply do not have a valid secondary purpose.[12]

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[11] Key to the *Brown* test is a demonstration that the seizure or search is motivated by serious public concerns. 443 U.S. at 50-51. Unlike a sobriety checkpoint where societal interests and concerns may be presumed to be high, a governmental entity must present some evidence that public concern over license and registration issues justifies a roadblock. Otherwise, a court should find that, even under the balancing test, the seizure is not justified. A good example of this, and a situation with which the City should be familiar, is *Covert v. State*, 612 N.E.2d 592 (Ind.Ct.App. 1993). There, the defendant had been arrested for operating a vehicle while intoxicated after he was discovered at a roadblock which was designed to check licenses and registrations, as well as the lights, brakes, tires and mufflers of each car. In finding that the roadblock was unconstitutional the court noted that "[a]lthough the roadblock may have been designed to further a legitimate governmental interest, both the interest furthered and the degree to which the roadblock was designed to further it are not weighted in favor of the State." 612 N.E.2d at 596.

[12] There may be situations, although this case is not one, where there is a legitimate mixed-motive seizure or search that makes it is impossible to tell if the dominant purpose is to search for evidence of a crime or to advance some other regulatory or safety purpose. Even in that situation, however, there is no need to look into public officials' mental processes. Rather, such a mixed motive should compel the court to examine the government's actions to determine whether its criminal investigatory purposes increase the intrusiveness of the search or seizure in any way over what the government would otherwise have conducted in pursuit of its legitimate regulatory goals. If so, the search or seizure cannot be analyzed as a regulatory or other non-investigatory search or seizure. Instead, individualized suspicion is required and the *Brown* balancing test is inapplicable.

As the Court of Appeals recognized, the roadblocks operated by the City had only one purpose, to interdict drugs. The City has not attempted to show that any regulatory purpose is justified under the *Brown* standard. A seizure for the criminal investigatory purpose of interdicting drugs is not permissible absent cause.[13]

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[13] The holding of the Court of Appeals is hardly unique here and the many other cases reaching similar decisions demonstrates that courts readily comprehend the difference between a roadblock set up to investigate criminal activity and one which is set up for another purpose. *See, e.g., United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) [finding unconstitutional evidence seized at a roadblock established under pretext of ensuring compliance with traffic laws, but actually designed to interdict illegal drugs. The court noted that "[t]he Supreme Court has thus repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches." 154 F.3d at 554. (Internal quotation and citation omitted)]; *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992) [although the roadblock checked licenses, its primary purpose was to use a drug-sniffing dog to determine if there were drugs present. The seizure of the drugs was deemed to be unconstitutional]; *Garcia v. State*, 853 S.W.2d 157, 159 (Tex.Ct.App. 1993) [conviction of motorist stopped at a checkpoint was overturned since the "[s]tatutes which allow law enforcement personnel to detain motor vehicles for the purpose of determining whether the driver has the required license do not allow 'fishing expeditions.' . . . Such general investigatory stops are not permitted by the federal constitution or the Texas Constitution."]; *Galberth v. United States*, 590 A.2d 990, 998 (D.C.App. 1991) [overturning conviction of a defendant who had been stopped at a roadblock which had as its primary purpose the detection of crimes related to "violence, drugs and guns." The court noted *Sitz* and *Martinez-Fuerte*, and stated that "[t]he Supreme Court has never upheld, by contrast, a police roadblock designed to promote general law enforcement purposes. Indeed, the Court has indicated that the police must

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have individual suspicion before they can seize someone for general law enforcement purposes." 590 A.2d at 998]. Even cases which have upheld the use of checkpoints have intimated that if the roadblocks were for the purpose of criminal investigation they would be unconstitutional. *See, e.g., United States v. McFayden*, 865 F.2d 1306 (D.C.Cir. 1989) ["It is possible that a roadblock purportedly established to check licenses could be located and conducted in such a way as to indicate that its principle purpose was the detection of crimes unrelated to licensing . . . Such a subterfuge might result in an infringement of Fourth Amendment rights, and some courts have so held."]; *LaFontaine v. State*, 497 S.E.2d 367, 369 (Ga.), *cert. denied*, 525 U.S. 947 (1998) ["a roadblock cannot be used as a subterfuge to detain citizens for the purpose of searching their automobiles . . . "]; *People v. Perez*, 51 Cal.App. 4th 1168, 1175, 59 Cal.Rptr.2d 596, 599 (1996) [Fish and game traffic checkpoint upheld only after court concludes that Fish and Game checkpoint is primarily regulatory in purpose, even though it is also operating as a search or inspection for violation of law.] *See also Commonwealth v. Rodriguez, supra*, 722 N.E.2d at 434-35 [declaring a drug interdiction roadblock unconstitutional under the Massachusetts Constitution and noting that it allowed the same type of general warrant search that James Otis and John Adams intended the state constitutional provision to prevent.]

In *Merrett v. Moore*, 58 F.3d 1547, 1551, n. 3 (11th Cir. 1995), *cert. denied*, 519 U.S. 812 (1996), although the roadblock was upheld, the court noted that it was leaving open the question of the constitutionality of a roadblock designed solely to interdict drugs. *But see, State v. Damask*, 936 S.W.2d 565 (Mo. 1996) [upholding validity of roadblock which was designed solely to interdict drugs.]

II. EVEN IF A BALANCING TEST IS UTILIZED TO ASSESS THE CONSTITUTIONALITY OF THE DRUG ROADBLOCKS, THE ROADBLOCKS ARE IMPROPER

The City's claim that the balancing test of *Brown* must be utilized here is therefore erroneous since it violates the principle that some cause must be present before a criminal investigatory seizure occurs. However, even if *Brown* is used in this case to analyze the criminal investigatory roadblocks, the roadblocks are unconstitutional.

Brown requires that, in order to determine the validity of the search or seizure, a court must weigh the gravity of the public concerns served by the search or seizure, the degree to which the search or seizure advances this interest, and the severity with which the search or seizure interferes with individual liberty. 443 U.S. at 50-51. In analyzing the last prong of the balance, this Court noted in *Sitz* that the interference with liberty must be judged from both the standpoint of the " 'objective' intrusion, measured by the duration of the seizure and the intensity of the investigation" and the "subjective intrusion on the motorists." 496 U.S. at 452-53. The subjective intrusion is measured by the roadblock's potential for generating fear and surprise in law-abiding motorists. 448 U.S. at 453.

From a subjective standpoint, the roadblocks here are markedly different from those in *Sitz* or in *Martinez-Fuerte* because of a number of factors which increase the roadblock's potential for generating fear and surprise. First, is the addition of the drug-sniffing dog. Although a dog sniff may not be a search for Fourth Amendment

purposes when possessions are being sniffed, *United States v. Place*, 462 U.S. 696 (1983), this does not mean that a dog sniff does not markedly increase the potential for generating fear and surprise, especially when a person perceives that he or she is being sniffed. *See, e.g., B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1266 (9th Cir. 1999); *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 478-79 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).[14] An innocent person may not have anything to fear from a sobriety checkpoint which, as in *Sitz*, only involves a brief examination by an officer; by contrast, having to depend on the uncertain reaction of an animal, and how that reaction is interpreted by police, can be extremely alarming.[15]

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[14] The issue at bar is not whether a dog sniffing the exterior of a car in which the driver remains is a search for Fourth Amendment purposes. Even if it is not, it is clear that this is markedly different than an unattended baggage sniff by a dog, and it is not unrealistic to conclude that innocent persons may react with fear and surprise when they are in their car being circled, not only by law enforcement officers, but by a dog trying to detect unknown odors.

[15] This is especially true given the apparent uncertain accuracy of "dog sniffs" in suspicionless drug interdiction efforts. Drug detection dogs often are less accurate when the dog sniffs survey a random population as opposed to when the police also use their expertise to target the dog more narrowly. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KENTUCKY L.J. 405, 430-431 (1996-97). For example, during random stops in the Florida roadblocks which were the subject of *Merrett v. Moore, supra*, 1,450 vehicles were sniffed, the dogs alerted to 28 vehicles, and only one person was arrested for narcotics possession. 58 F.3d at 1549. Additionally, "the dogs scratched several cars; and one person was bitten by a dog." *Id.* In *Doe v. Renfrow*, 475 F.Supp.

Moreover, the drug checkpoints in Indianapolis constitute a much stronger showing of police presence than the sobriety checkpoint in *Sitz* or the initial stop at the immigration checkpoint in *Martinez-Fuerte*. As the vehicle pulls up there may be as many as 30 officers present. The stopped cars are met by a team of officers. (Pet. App. 57a). One officer takes the license and registration to check it. A drug-sniffing dog is led around the car. At the same time, a plain view inspection occurs. The policy also allows for searches by consent. (Pet. App 53a). The policy therefore focuses an intense police effort on each vehicle. In *Martinez-Fuerte*, the stops were deemed to be permissible because they could not be considered to "be frightening or offensive because of their public and relatively routine nature." 428 U.S. at 560. Although the stops here are public, they are not routine, and they certainly pose the potential of being alarming, even to innocent persons.

From an objective standpoint, the City's drug interdiction stops are also different from the drunk driving and immigration checkpoints. The parties stipulated that the temporal goal for the checkpoints is five minutes or less, a marked increase over the 25 seconds that the

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1012 (N.D.Ind. 1979), *aff'd in part and remanded in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981), a random sniff of more than 2,700 junior and senior high school students resulted in fifty indications by the dogs that drugs were present on the students although only 17 students were found in possession of contraband. 451 U.S. at 1023-24 (Brennan, J., dissenting from denial of *certiorari*). Statistics like this certainly explain why an individual would feel a heightened increase in fear and surprise if they were met with a dog sniff as part of a roadblock.

drunk driving roadblocks took in *Sitz*, 496 U.S. at 448, and reflects the increased activity featured in the roadblocks – drug-sniffing dogs, plain view inspections, checking of licenses and registrations, and potential seeking of consent to searches. Although the referrals to the secondary inspection areas at use in one of the roadblocks in *Martinez-Fuerte* could take three to five minutes, 428 U.S. at 547, most of the immigration stops were extremely brief, perhaps even allowing for "rolling stops" of vehicles. Furthermore, the objectivity of the intrusion must be measured not just by time, but by the intensity of the investigation. *Sitz*, 496 U.S. at 452-53. The investigation here, involving multiple officers and dogs, is intense and must be recognized as significantly impinging upon the motorists' privacy interests. Because they are more intrusive than the roadblocks in either *Sitz* or *Martinez-Fuerte*, the roadblocks here are unconstitutional even under the balancing test of *Brown*.

CONCLUSION

This Court should therefore affirm the judgment of the court of appeals.

Respectfully submitted,

KENNETH J. FALK
Counsel of Record
JACQUELYN E. BOWIE
SEAN C. LEMIEUX
E. PAIGE FREITAG
CHRISTOPHER M. GIBSON
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

STEVEN R. SHAPIRO
American Civil Liberties Union
Foundation
125 Broad St.
New York, N.Y. 10004
212/549-2500

Counsel for Respondents

28

(12)

No. 99-1030

Supreme Court, U.S.
FILED
AUG - 7 2000
CLERK

IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND
BART PETERSON, IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioners,

v.

JAMES EDMOND AND JOELL PALMER,
ON THEIR OWN BEHALF AND ON BEHALF OF
A CLASS OF THOSE SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

A. SCOTT CHINN
CORPORATION COUNSEL FOR THE
CITY OF INDIANAPOLIS
Counsel of Record
ANTHONY W. OVERHOLT
OFFICE OF CORPORATION COUNSEL
Suite 1601, City-County Building
200 East Washington Street
Indianapolis, Indiana 46204
(317) 327-4055

MATTHEW R. GUTWEIN
THOMAS M. FISHER
APRIL E. SELLERS
BAKER & DANIELS
300 North Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Petitioners

August 7, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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CITY OF INDIANAPOLIS, INDIANA, AND
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Respondents.

**On Writ of Certiorari to the
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for the Seventh Circuit**

REPLY BRIEF FOR PETITIONERS

Respondents divide Fourth Amendment jurisprudence into two neat parts based on the government's state of mind. According to respondents, searches and seizures that the government conducts primarily for criminal-investigatory purposes invariably must be supported by cause, while searches and seizures that the government conducts primarily for non-criminal-investigatory purposes in some circumstances may be pursued without cause. Resp. Br. 11, 20-21. As a threshold matter, respondents' criminal/non-

criminal distinction finds no home in the text of the Fourth Amendment. And although this case is about automobile-checkpoint seizures, respondents construct their binary model based on search cases within the "special needs" doctrine. Thus, respondents examine regulatory-search, inventory-search, and drug-testing-search cases (*id.* at 11-16), and then strain to square those unrelated cases with the precedents relevant here—*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), and *Brown v. Texas*, 443 U.S. 47 (1979). Resp. Br. 16-25. Respondents' global Fourth Amendment theory fails because *Martinez-Fuerte* and *Sitz* establish definitively that police may conduct automobile checkpoints for criminal-investigatory purposes.

Equally unsound is respondents' argument that the Court should disregard the City's other checkpoint justifications (checking licenses, registrations, and for impairment) because the City's "dominant purpose" is to interdict drugs. Resp. Br. 34-37 n.12. The City's alternative justifications are indisputably legitimate, and respondents concede that courts will sometimes find it "impossible" to determine whether criminal-investigatory interests supply the "dominant purpose" behind checkpoints ostensibly conducted for other purposes. *Id.* at 37 n.12. The test respondents offer to evaluate these "impossible" situations demonstrates what the City has explained in this case: the constitutionality of a police checkpoint does not turn on the government's motivation.

ARGUMENT

I

1. *Martinez-Fuerte* and *Sitz* cannot be recast as special-needs or administrative-search cases. Contrary to respondents' assertions, *Martinez-Fuerte* did not decide to apply a balancing test to checkpoint stops based on Congress's power over immigration and border controls. The

Court nowhere even mentioned the checkpoints' border- and immigration-control purposes as justifications for applying a balancing test. In noting that the government's interests were "legitimate and in the public interest," the Court merely was balancing the interests at stake. *Martinez-Fuerte*, 528 U.S. at 562. And in deciding to apply a balancing test to the checkpoints, the Court appropriately focused on motorists' reduced expectations of freedom of movement and privacy in their automobiles, not on Congress's power over immigration and border controls. *Id.* at 561. Governments at all levels subject motorists to detailed regulations and limits. For example, the government forces motorists to stop at railroad crossings, stoplights and stop signs, and the police stop cars at checkpoints to search for fugitives and missing persons. All motorists, not merely those crossing international borders, have reduced expectations of freedom of movement and privacy.

Further, that *Martinez-Fuerte* characterized immigration-control checkpoints as "legitimate and in the public interest" hardly signals a special Fourth Amendment status not applicable to checkpoints that state and local governments employ for other sound reasons. For example, *Sitz* approved a state's sobriety checkpoints, thus proving that Congress's immigration- and border-control powers are not special in this regard. And while *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979), confirms the unremarkable proposition that immigration- and border-control powers reside only with the federal government, states and cities have general police powers that allow them to enact narcotics and traffic-safety laws and to establish checkpoints to enforce them. Those local powers are on equal Fourth Amendment footing with Congress's border-control powers. But under respondents' theory, the Border Patrol could operate a checkpoint in Detroit (which, like the checkpoint in *Martinez-Fuerte*, is within 100 miles of an international border) using trained dogs to sniff contraband, but the Detroit police would be

precluded from operating the same checkpoint in the same location using the same minimally intrusive techniques.

Similarly, in deciding to apply *Brown* balancing, *Sitz* did not rely on, or even mention, any "non-criminal investigatory purpose." Resp. Br. 22. Rather, *Sitz* acknowledged that at least two people had been arrested at Michigan's sobriety checkpoints (*Sitz*, 496 U.S. at 448), and in applying *Brown* the Court referred to checkpoints as a "law enforcement technique" and as a means of "apprehending drunken drivers." *Id.* at 453. Respondents acknowledge (as they must) that *Sitz* expressly eschewed reference to "special needs"—*i.e.*, non-criminal-investigatory needs—to justify applying *Brown*. Resp. Br. 23. Consequently, contrary to respondents' assertion, *Sitz* did indeed "authorize police stops which are designed solely or primarily for purposes of normal police investigation" (*id.*), so long as such stops pass *Brown* balancing.[1]

Equally unhelpful is respondents' argument that the Court's decision to apply a balancing test to immigration and

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[1] The Court in *Sitz* was confronted with, and rejected, the very argument that respondents advance here—that criminal-investigatory checkpoints should be treated differently from other kinds of checkpoints. Indeed, the position of the American Civil Liberties Union (co-counsel for respondents) in this case that sobriety checks are *not* for the purpose of criminal investigation marks a dramatic departure from the position it took on behalf of respondents in *Sitz*, where it argued that "the seizure of motorists under the Michigan State Police sobriety roadblock is designed to serve only one purpose—the enforcement of criminal laws against drunk driving. Such roadblocks are instituted to detect and arrest intoxicated drivers. Quite clearly, these roadblocks serve no special need, 'beyond the normal need for law enforcement.'" *Sitz* Resp. Br. 11. The Court agreed and applied *Brown v. Texas*, 443 U.S. 47, 50-51 (1979) (which supplies a criminal investigation standard), rather than *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (which supplies a "special needs" standard). *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990).

sobriety checkpoints may be justified because "criminal prosecution is not the principal or ultimate goal of the program." Resp. Br. 17. To say that prosecution for smuggling illegal aliens furthers the government's public-policy goal of curbing illegal immigration, or that prosecution for drunk driving furthers the government's public-policy goal of preventing accidents, does not distinguish these prosecutions from any other. Just as "[t]he need to keep imminently unsafe drivers off the road is a non-criminal investigatory interest" (*id.* at 22), so too is the need to keep imminently unsafe narcotics off the street a non-criminal-investigatory interest. And just as "interdicting the flow of illegal entrants" into the United States before illegal aliens reach large labor markets serves "the public interest" (*Martinez-Fuerte*, 428 U.S. at 552, 562), so too does interdicting the flow of illegal narcotics before the drugs reach consumer markets serve the larger public interest. Whenever the government pursues an investigation to enforce the law—criminal or civil—the government furthers its interest in protecting the health, safety and welfare of the citizenry. That is why the underlying public policy promoted by the checkpoints played no part in the Court's decisions to employ Fourth Amendment balancing tests in *Martinez-Fuerte* and *Sitz*.

2. To make their theory work, respondents also recast *Brown v. Texas*, 443 U.S. 47 (1979). Respondents assert that *Brown* balancing applies only in non-criminal-investigatory cases, such as administrative- and regulatory-search and seizure cases. Resp. Br. 20. But *Brown* itself was a criminal investigation case. *See Brown*, 443 U.S. at 48-49. And in articulating the Fourth Amendment balancing test, *Brown* specifically contemplated seizures in the criminal-investigatory context, stating, "[t]he reasonableness of seizures that are less intrusive than a traditional arrest *** depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary

interference by law officers.'" *Brown*, 443 U.S. at 50 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). The Court subsequently has applied *Brown* balancing only in criminal-investigatory contexts. In *Sitz*, the Court applied it to sobriety checkpoints designed to detect criminal conduct. 496 U.S. at 453. And in *Rawlings v. Kentucky*, 448 U.S. 98, 110 n.5 (1980), the Court cited *Brown* balancing as the proper standard where the police "temporarily detain[] a person at the scene of suspected drug activity to secure a search warrant . . . ." *See also United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (applying *Brown* balancing to DEA officers' stop of an airline passenger for the purpose of investigating drug trafficking).

Meanwhile, in non-criminal-investigatory, or "special needs," cases, the Court has never relied on *Brown*. In *New Jersey v. T.L.O.*, where Justice Blackmun characterized administrative-search cases as presenting "special needs, beyond the normal need for law enforcement," neither the Court nor Justice Blackmun cited *Brown* in deciding to use a balancing test to review a school principal's search of a student's purse. 469 U.S. 325, 337, 351 (1985). Likewise, the Court has not cited *Brown* in cases reviewing government inspections of closely regulated businesses or in cases reviewing drug-testing programs. *See New York v. Burger*, 482 U.S. 691, 702-04 (1987); *Donovan v. Dewey*, 452 U.S. 594, 598-604 (1981); *Chandler v. Miller*, 520 U.S. 305, 313-20 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). *See also Griffin v. Wisconsin*, 483 U.S. 868, 873-77 (1987) (analyzing the search of a probationer's apartment under the "special needs" doctrine, and not citing *Brown*).

Nor has the Court's use of *Brown* in the criminal-investigatory context opened the door to unrestricted searches and seizures, as respondents portend. Resp. Br. 32-33. *Brown* requires an inquiry not only into the weight of the asserted governmental interest, but also into the degree of intrusion the governmental action imposes on individuals. *Brown*, 443 U.S. at 51. Like *Martinez-Fuerte* and *Sitz*, this case concerns only brief seizures of automobiles, not searches of pedestrians, who have higher expectations of freedom of movement and privacy than do motorists. Under circumstances more personally invasive than the brief seizures at issue here, the degree of intrusiveness may outweigh the government's asserted interest.

Respondents' argument that the City's checkpoints are overly intrusive (Resp. Br. 40) under *Brown* also is insupportable. The Court in *Martinez-Fuerte* and *Sitz* held that checkpoints are permissible because the obvious police presence and use of uniform procedures reduce innocent motorists' subjective fear and alarm. *Martinez-Fuerte*, 428 U.S. at 558; *Sitz*, 496 U.S. at 453. Here, the police post signs to advise motorists that they are approaching a narcotics-detection checkpoint where a "K-9" will be used and station marked cruisers near the checkpoints. Pet. App. 57a. Moreover, officers have no discretion over how to operate the checkpoints: detailed, written guidelines require officers to stop only predetermined sequences of cars and instruct officers what to say, what to observe, and what to do.[2] *Id.* at

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[2] While the IPD devotes 30 officers to each checkpoint, it is not the case, as respondents imply (Resp. Br. 42), that all 30 officers approach each car. Rather, the officers must manage numerous cars at once, and their attention is divided among various tasks, including checking licenses and registrations with motorists, using the computer to check for valid licenses and for outstanding warrants, handling the narcotics dog, and ensuring the overall safety and efficiency of the checkpoint. Had the City devoted fewer officers, the stops would have lasted longer, and

26a-27a. Thus, the City's checkpoints protect motorists from exactly the kinds of arbitrary or excessive intrusions the Court has invalidated in connection with automobile stops. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

Furthermore, respondents suggest that dog sniffs yield "uncertain" results and therefore are likely to cause motorists greater "fear and surprise." Resp. Br. 40-41. But they do not explain why the reaction of an officer concerning a driver's sobriety is likely to be more "certain" than the reaction of a narcotics-detection dog with superior olfactory capabilities and fewer distractions. *See id.* at 41. More fundamentally, the mere possibility that a dog sniff at the City's checkpoints may yield a false positive in a particular instance is not properly before the Court. "As pursued in the lower courts, the instant action challenges only the use of . . . checkpoints generally." *Sitz*, 496 U.S. at 450. This case is not about what happens *after* the stops in individual cases; any unconstitutional police or narcotics-dog conduct occurring after the stops remains subject to case-by-case judicial review. Indeed, respondents have repeatedly disclaimed any challenge to the dog sniffs in this case. Resp. Br. 41 n.14; Resp. Seventh Cir. Reply Br. 3 n.1.

II

Respondents argue that the City's additional justifications for its checkpoints—to conduct license, registration, and sobriety checks—merely amount to a disingenuous "scheme to keep drivers seized" during the dog sniff. Resp. Br. 35. They urge the Court to look behind the City's additional purposes and invalidate the checkpoints because the City also has an "overriding" drug-interdiction purpose. *Id.* at 36. But in stating that there is no evidence of the City's other

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respondents surely would have complained even more that the stops' duration renders them unreasonable.

interests, respondents ignore the record; in arguing that the Court may disregard the City's asserted interests, they contradict the Court's precedents; and in urging the Court to determine the relative priorities of municipal and law enforcement officials, they propose an impractical and elusive inquiry that they themselves do not embrace and ultimately concede to be unworkable.

1. Respondents are flatly wrong when they argue that the City is uninterested in conducting license, registration, and sobriety checks. Resp. Br. 34-38. According to the City's checkpoint guidelines, the officers' first actions are to check licenses and registrations and to "[l]ook for signs of impairment." Pet. App. 53a; *compare with Sitz*, 496 U.S. at 447 ("drivers [are] briefly examined for signs of intoxication."). Consequently, nearly half of the arrests at the checkpoints were not related to narcotics. Pet. App. 2a-3a. Based on this evidence, the district court specifically found that the City's checkpoints' "stated and actual purposes include" narcotics checks "*and* checking licenses and registrations." *Id.* at 43a-44a. Further, *Sitz* held that checking motorists' sobriety is a valid justification for a checkpoint, and *Prouse*, 440 U.S. at 658, 663, established that checking licenses and registrations vindicates a "vital" interest that can justify a checkpoint. Thus, the City need not "present some evidence that public concern over license and registration issues justifies a roadblock." Resp. Br. 37 n.11.

2. These additional interests justify the City's checkpoints, notwithstanding the City's other motivations. The central teaching of *Whren v. United States*, 517 U.S. 806, 813 (1996), is that the police may stop a motorist as long as there is a legitimate objective reason to do so, even if the officers' subjective motivations for the stop are improper. Respondents do not offer a principled explanation for why checkpoints *must* be judged based on the City's programmatic motivations while a particular seizure *may not* be judged

based on an officer's motivations. *Whren*'s rationale for insisting solely on an objective inquiry applies equally where officers have no individualized suspicion (*see Bond v. United States*, 120 S.Ct. 1462, 1465 n.2 (2000)) and instead follow the express directives of city policymakers. And while the City has admitted that drug interdiction is a principal purpose for the checkpoints, *Whren* explained that the basis for rejecting a subjective inquiry does not rest solely, "or even principally," on the difficulty of obtaining evidence of the government's intent. *Whren*, 517 U.S. at 814. Rather, the "principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id.* In other words, it is precisely the Fourth Amendment's concern for reasonableness—by nature an objective inquiry—that precludes judging the City's checkpoints based on the motivations behind them.

An additional problem is that, notwithstanding the City's candor in this case, respondents' methodology would require courts reviewing future checkpoints to "plumb the collective consciousness of law enforcement" (*Whren*, 517 U.S. at 815) and determine whether an improper purpose "overrides" a permissible one. Such an undertaking would be highly elusive and, indeed, more difficult than determining the subjective intent of a single law enforcement officer—a practice the Court has rejected. *Id.* Modern law enforcement programs are developed with input from multiple officials and groups and, consequently, serve multiple purposes, such as preventing crime, deterring disfavored behavior, promoting public safety, stimulating economic development, and instilling community pride.

Respondents do not propose a reliable framework (nor does one exist) for courts to consider these various interests and to

arrive at a single, overriding "programmatic purpose." Instead, they merely cite *Michigan v. Clifford*, 464 U.S. 287, 297-98 (1984), for the proposition that courts will find primary purpose "not by looking into the thought processes of those involved, but by reaching reasonable conclusions based on the evidence before the Court." Resp. Br. 36. But *Clifford* invalidated a search that occurred *after* the government had exhausted its administrative needs. *Clifford*, 464 U.S. at 297 ("Because the cause of the fire was then known, the search of the upper portions of the house . . . could *only* have been a search to gather evidence of the crime of arson.") (emphasis added); *see also Michigan v. Tyler*, 436 U.S. 499, 511-12 (1978) (invalidating fire and police officers' follow-up searches that occurred after exigency period had passed). With checkpoint stops, however, the government pursues multiple purposes simultaneously. In such circumstances, any material intrusion under the Fourth Amendment is the same regardless of purpose, and courts will find it immeasurably more difficult (and ultimately pointless) to try to determine whether an overriding improper purpose exists. For example, some police dogs are trained to detect not only drugs, but also humans and currency. United States Br. 1; *see also United States v. Wilson*, 7 F.3d 828, 832 (9th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994); *United States v. Bajakajian*, 524 U.S. 321, 324 (1998). Thus, when the Border Patrol uses a dog at a checkpoint to sniff for illegal aliens, the dog simultaneously sniffs for drugs. Irrespective of whether the Border Patrol's "dominant purpose" is to check for illegal aliens or for drugs, the Border Patrol's conduct is identical. But under respondents' theory, the government's identical conduct, which imposes the identical degree of intrusion upon motorists, will be treated differently depending upon the government's "dominant purpose."

Further, respondents do not elaborate how courts would undertake such a case-specific inquiry. In his dissent below, Judge Easterbrook warned that a checkpoint trial will be "one

at which officials of Indianapolis will testify about their motivations in approving the roadblock program, and the district judge must make credibility findings to resolve the fourth amendment objection." Pet. App. 15a. Because the City has a new mayor since the initial formulation of the checkpoint policy, this inquiry is even more complex in this case. Is the current administration stuck with the publicly stated positions of the prior administration? May the new mayor credibly disavow the prior administration's purposes while conducting the checkpoints in the exact same manner? Nor is it clear whether a judge or a jury would decide this credibility issue. But regardless who decides, respondents' theory would inevitably lead to different conclusions about identically operated checkpoints. Decisions about constitutionality would depend not on the conduct of police, but on the content of the government's press releases and public statements (here from the prior city administration). Resp. Br. 35-36.

Judge Easterbrook also pointed out the disconnection between the motivations behind checkpoint programs and the Fourth Amendment inquiry: "[I]f a dog may be added to the program sustained in *Sitz*, it can't matter to 'reasonableness' whether some of the program's sponsors thought the dog more important than the breathalyzer." Pet. App. 15a. That respondents are willing to argue here that the City is not sufficiently motivated by its asserted license-check and driver-impairment interests, despite stipulated evidence and the IPD's conduct to the contrary, demonstrates how unrelated their approach is to an objective inquiry and how muddled their alternative inquiry would be. *See* Resp. Br. 34-35.

3. Ultimately, respondents themselves recognize that the constitutionality of a checkpoint does not, contrary to their global theory, turn on the government's motivation. Respondents concede, as they must, that with mixed-motive

checkpoints it can be "impossible" to determine the government's primary purpose. Resp. Br. 37 n.12. In such cases, they assert, if the government's "criminal investigatory purposes increase the intrusiveness of the search or seizure in any way over what the government would otherwise have conducted in pursuit of its legitimate regulatory goals," the checkpoint (assuming it is conducted without cause) should be declared invalid. *Id.* Thus, respondents assert that, in "impossible" cases, the government's need for cause to conduct a search or seizure depends on the intrusiveness of the government's actions, not on the government's purpose. Respondents' "impossibility" test highlights the incurable defects in their global theory, and this new twist is inconsistent with precedent and unworkable.

As an initial matter, respondents' novel proposal amounts to a back-door method of invalidating law enforcement practices the Court has long approved under the Fourth Amendment, such as minimally intrusive dog sniffs and plain-view observations. Notwithstanding the lawfulness of minimally intrusive dog sniffs (*United States v. Place*, 462 U.S. 696, 707 (1983)), under respondents' theory they presumably would be invalid (absent cause) because of what they supposedly reveal about the government's motivations. Similarly, though *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), upheld a maritime document-inspection stop where "visual inspection of the [vessel] is limited to what can be seen without a search" (*id.* at 592, quoting *Martinez-Fuerte*, 428 U.S. at 558), including an officer's peering through an open hatch (*id.* at 583), under respondents' theory, this non-search "visual inspection" would invalidate the stop because it was "intrusive to some degree" (*id.* at 592) and was attributable only to a criminal-investigatory purpose (*see id.* at 583). Respondents' theory would, in short, require overruling *Place*'s holding that a minimally intrusive dog sniff is not subject to Fourth Amendment review, as well as *Villamonte-Marquez* and possibly other precedents. *See,*

e.g., *Texas v. Brown*, 460 U.S. 730, 739-40 (1983) (plurality opinion of Rehnquist, J.) (stating that an officer's shining a flashlight into a car stopped at a license checkpoint and shifting his position to gain a better view for criminal investigation purposes are not subject to challenge under the Fourth Amendment); *Martinez-Fuerte*, 428 U.S. at 558 (upholding an automobile checkpoint where "visual inspection of the vehicle is limited to what can be seen without a search.").

Furthermore, respondents' "impossibility" test is sure to yield inconsistent results. The precise circumstances where a court would find it "impossible" to discern the government's primary purpose for a search or seizure are undefined and, more likely, undefinable. Does "impossibility" arise merely where there is "some evidence [of] public concern" (Resp. Br. 37 n.11) related to the asserted regulatory interest? Or is there a way to prioritize conflicting evidence that resolves the dilemma, *i.e.*, does the mayor's word count more than the police chief's? Nor do respondents state whether "impossibility" is a matter for a jury or a judge to decide, or, if a jury is to determine "impossibility," whether the trial would be bifurcated for an initial "impossibility" determination. As with respondents' more general inquiry into programmatic purpose, these lingering questions would inevitably lead to disparate treatment of identical checkpoints, and they show how far removed respondents' theory is from the inquiry into reasonableness established in *Martinez-Fuerte*, *Sitz*, *Brown* and *Whren*.

* * * *

"It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring). Respondents propose such a Grand Unified Theory of the Fourth Amendment in this case,

one that would resolve all Fourth Amendment cases based on whether criminal investigation is the primary purpose for police conduct. However, "the same constitutional principle may operate very differently in different contexts * * * [a]nd setting forth a unitary test for a broad set of cases may sometimes do more harm than good." *Id.* In this case, respondents' Grand Unified Theory crumbles as soon as it is applied. To focus on the government's primary purpose would enmesh the Court in second-guessing the motivations of municipal leaders and police officers and would contradict *Martinez-Fuerte*, *Sitz*, *Brown* and *Whren*. The Court instead should reaffirm those cases and uphold the City's checkpoints.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

A. SCOTT CHINN
CORPORATION COUNSEL FOR THE
CITY OF INDIANAPOLIS
Counsel of Record
ANTHONY W. OVERHOLT
OFFICE OF CORPORATION COUNSEL
Suite 1601, City-County Building
200 East Washington Street
Indianapolis, Indiana 46204
(317) 327-4055

MATTHEW R. GUTWEIN
THOMAS M. FISHER
APRIL E. SELLERS
BAKER & DANIELS
300 North Meridian Street
Indianapolis, Indiana 46204
(317) 237- 0300

Counsel for Petitioners

August 7, 2000

Supreme Court, U.S.
FILED
MAY 15 2000

(5)

No. 99-1030

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JAMES EDMOND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
KARIN B. HOPPMANN
MICHAEL A. ROTKER
Attorneys
Department of Justice
Washington, D. C. 20530-0001
(202) 514-2217

36 pp

QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a "narcotics detection" dog around the exterior of each stopped automobile violate the Fourth Amendment.

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INTEREST OF THE UNITED STATES

This case involves the validity under the Fourth Amendment of a vehicle checkpoint that serves interests in drug detection, license and registration checks, and driver sobriety. The United States maintains vehicle checkpoints for a variety of purposes. Because "the smuggling of aliens and drugs are intermingled by criminal organizations operating at an international level," Border Patrol officers are cross-designated to search for and seize illegal narcotics in their checkpoint operations.[1] Border Patrol canines are trained to detect both concealed humans and drugs. In addition, the Forest Service sometimes operates multi-purpose check-

[1] See Memorandum of Understanding Between the Drug Enforcement Administration and the Immigration and Naturalization Service 1, 3 (Mar. 25, 1996).

points on roads within the National Forest System, which can include verification of drivers' licenses and registration, assessments of impairment, and the conduct of canine sniffs of cars' exteriors. Forest Service Handbook 5309.11, Sec. 360 (Sept. 1998). Furthermore, because motor vehicle transportation plays a critical role in the nationwide distribution of illegal narcotics, the Drug Enforcement Administration, the Department of Transportation's Drug Interdiction Assistance Program, and other federal components have a substantial interest in efforts to curb drug trafficking on the public roadways.

STATEMENT

1. From August to November 1998, the Indianapolis Police Department operated six motor vehicle "drug checkpoints" on public roads. Pet. App. 51a-52a. At those checkpoints, police officers stopped a predetermined number of cars, checked each driver's license and registration, looked for signs of impairment, and, while examining each driver's documentation, walked a narcotics-detection dog around the car. *Id.* at 2a, 25a, 53a. Stops averaged two to three minutes; officers endeavored to ensure that, absent individualized suspicion, no vehicle was delayed more than five minutes. *Id.* at 38a, 51a.

Police officers conducted the checkpoints in accordance with detailed, written procedures promulgated by the Indianapolis Police Department. Pet. App. 26a-27a. The time and place of each checkpoint was set by supervisory personnel weeks in advance "based on geographical suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which [would] minimize the interference with normal traffic flow." *Id.* at 56a-57a. The date of

each checkpoint (but not its exact location) was then disseminated to the public. *Id.* at 37a. Motorists approaching the checkpoint were forewarned by lighted signs stating: "NARCOTICS CHECKPOINT __ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." *Id.* at 57a. The checkpoint itself was identified by marked police cruisers with flashing lights. The stopped cars were met by a team of police officers, at least one of whom was in full uniform. *Ibid.* The governing procedures required that "no discretion [be] given to any officer to stop any vehicle out of sequence," and that "every vehicle * * * stopped must be examined in the *same* manner [with] no exceptions." *Id.* at 27a, 54a.

The "primary goal" of the checkpoints was to detect narcotics traffickers and thus "to interrupt the flow of illegal narcotics throughout Indianapolis." Pet. App. 25a. "[A] secondary purpose of the checkpoints [was] to check driver's licenses and vehicle registrations." *Id.* at 44a. Police stopped a total of 1,161 vehicles, resulting in 109 arrests and thus an effectiveness rate of 9.4%. *Id.* at 2a-3a, 13a, 55a. Those arrests were divided almost equally between traffic and drug offenses. *Id.* at 55a.

2. In October 1998, respondents, two motorists who had been stopped at checkpoints, filed suit under 42 U.S.C. 1983 seeking damages and an injunction on the ground that the checkpoints violated the Fourth and Fourteenth Amendments. Complaint 1, 8. The district court certified the case as a class action, Pet. App. 29a-30a, but denied a preliminary injunction because it found no likelihood of success on the merits of respondents' Fourth Amendment claim, *id.* at 32a-47a. Proceeding on a stipulated factual record, the district court found that motorists suffered "minimal" subjective and objective intrusion at the checkpoints, *id.* at 37a-40a,

while the stops effectively advanced important governmental interests in the interdiction of narcotics and the enforcement of licensing requirements, *id.* at 41a-45a.

3. A divided court of appeals reversed, holding that the checkpoints violated the Fourth Amendment. Pet. App. 1a-23a.

a. The majority acknowledged that the checkpoint stops, if evaluated at the programmatic level, "probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops," Pet. App. 3a, and given that they "advance[] the strong national, state, and local policy of discouraging the illegal use of controlled substances," *id.* at 4a. The majority held, however, that, in view of "the purpose of the roadblocks * * * to catch drug offenders," *id.* at 11a, the stop of each car must be based on individualized suspicion because the checkpoints "related to general criminal law enforcement, rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders." *Id.* at 4a (citation omitted).

The majority distinguished the Border Patrol checkpoints upheld in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), on the ground that Indianapolis "makes no attempt to defend its roadblocks on the basis that it is trying to exclude a harmful substance or dangerous persons[,] [t]hough that may be the ultimate aim." Pet. App. 10a. And it distinguished the sobriety checkpoints upheld in *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990), because those checkpoints "are designed to protect other users of the road from the dangers posed by drunk drivers," rather than "primarily [to] catch[] crooks." Pet. App. 8a.

The majority recognized four exceptions to its holding that the Fourth Amendment prohibits vehicle checkpoints aimed at law enforcement: checkpoints "set up to catch a fleeing criminal"; checkpoints set up when "it [is] impossible to prevent a crime without an indiscriminate search"; checkpoints "the objective of which is to protect a specific activity"; and checkpoints to prevent "illegal importation whether of persons * * * or of goods." Pet. App. 12a. The court suggested, moreover, that if the "primary purpose" of the checkpoints were to discover violations of the traffic laws or drunk drivers, the addition of a narcotics-detection dog might be permissible. *Id.* at 10a-11a.

b. Judge Easterbrook dissented. He criticized the majority's conclusion that a "law enforcement" purpose would render a vehicle checkpoint unreasonable, noting that "*Martinez-Fuerte* approved a roadblock to search for alien smuggling, a violation of a criminal law; *Sitz* approved a roadblock to search for drunk driving, a violation of a criminal law." Pet. App. 13a. The dissent also disagreed that the primary purpose of a checkpoint determines its constitutionality, noting that, under the majority's view, "if Indianapolis set out to find people driving without licenses and only later added a dog to sniff for drugs * * *, then the program would pass constitutional muster. But if the City first decides to search for drugs, then adds license checks * * * the program is invalid." *Id.* at 13a-14a. Similarly, "[i]f a program is designed primarily to search for people *using* drugs in the car, and only secondarily to locate drugs in the trunk, then it is valid; if it is designed primarily to search for carried drugs, and only secondarily for ingested drugs, then it is invalid." *Id.* at 14a. In the dissent's view, "the reasonableness inquiry under the fourth amendment is objective; it depends on

what the police do, not on what they want or think." *Ibid.*

SUMMARY OF ARGUMENT

1. Indianapolis's checkpoint program is consistent with the Fourth Amendment because the important public interests that are effectively served by the checkpoints outweigh the minimal intrusion imposed on motorists using the public highways. The City's checkpoints serve not one, but two vital public interests: the interdiction of narcotics trafficking and the enforcement of license-and-registration requirements for motorists. Drug trafficking on the public roadways has proven to be as formidable and intractable a law-enforcement problem as illegal immigration, which this Court has held justifies a comparable Border Patrol checkpoint program. Drug trafficking's attendant social costs—in lost lives, violence, crime, and general public disorder—parallel, if not exceed, those public-welfare concerns that sustain sobriety checkpoints. Moreover, because public roadways are the primary distribution network for illegal narcotics within the country, drug traffickers, like alien smugglers, depend upon automobile travel for their success.

This Court's cases also have repeatedly indicated that the Fourth Amendment permits license-and-registration checkpoints. Such checkpoints advance important public-safety concerns by ensuring that usage of the roadways is limited to those motorists and automobiles that satisfy the State's licensing criteria.

Further, nothing in the actual execution of the checkpoint process or in the driver's individual experience at the checkpoint exceeds what this Court has previously sanctioned under the Fourth Amendment. The only factual difference is the addition of a canine sniff of the

car's exterior, but, because the sniff neither entails a search nor lengthens the seizure, that distinction is of no constitutional moment.

2. The court of appeals invalidated the checkpoints because they served the needs of criminal law enforcement, rather than distinct public policy needs. But so do the immigration and sobriety checkpoints that this Court has previously upheld. See *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). Indeed, this Court has expressly rejected the imposition of a "special needs" requirement on automobile checkpoints. *Sitz*, 496 U.S. at 450.

The court of appeals also held that the primary purpose of the checkpoint program's designers was critical to its legality. But the entire scope of the seizure was a permissible means of implementing the checkpoints' secondary purpose—license and registration verification. The fact that the checkpoint program simultaneously advances another weighty public interest—narcotics detection—without entailing any additional intrusion upon motorists' liberty and privacy should enhance, not detract from, the checkpoint's legitimacy. In any event, the constitutionality of identically operated checkpoints should not turn upon post-hoc judicial rankings of the competing public purposes subjectively animating government officials. The Fourth Amendment's core function is to regulate what the police do in their interactions with individuals, not what they think.

ARGUMENT

VEHICLE CHECKPOINTS THAT SERVE GOVERNMENTAL INTERESTS IN DRUG-DETECTION AND LICENSE-AND-REGISTRATION INSPECTION ARE REASONABLE SEIZURES UNDER THE FOURTH AMENDMENT

A. The Fourth Amendment Permits Vehicle Checkpoints Where The Government Interests Served Justify The Intrusion

The "essential purpose" of the Fourth Amendment is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials." *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979). The validity of a particular practice under the Fourth Amendment generally turns on balancing the governmental interests promoted by the practice against its intrusion on Fourth Amendment interests. See, *e.g.*, *id.* at 654; *Vernonia School District 47J* v. *Acton*, 515 U.S. 646, 652-653 (1995).

Two principles frame the inquiry into the validity of Indianapolis's vehicle checkpoints. First, the Fourth Amendment does not impose an "irreducible requirement" of individualized suspicion. *Acton*, 515 U.S. at 653; *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). Rather, the "touchstone" of the constitutional inquiry is "the reasonableness in all the circumstances" of the practice at issue. *Maryland* v. *Wilson*, 519 U.S. 408, 411 (1997) (internal quotation marks omitted).

Second, what is reasonable "depends on the context." *T.L.O.*, 469 U.S. at 337. This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment," such that "warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or

office would not." *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976); see also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence."). "The fact that automobiles occupy a special category in Fourth Amendment case law is by now beyond doubt." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 315 n.10 (1978). That distinction arises, in part, because of the "obviously public nature of automobile travel," under which cars routinely "travel[] public thoroughfares where both [their] occupants and [their] contents are in plain view." *Opperman*, 428 U.S. at 367-368; see also *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974). In addition, automobiles, unlike homes or offices, are subject to a "web of pervasive regulation." *New York* v. *Class*, 475 U.S. 106, 112 (1986).

> As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

Opperman, 428 U.S. at 368.[2]

Consistent with the special status of automobiles in Fourth Amendment jurisprudence, this Court has twice upheld vehicle checkpoints as reasonable seizures under

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[2] See also *Wyoming* v. *Houghton*, 526 U.S. 295, 303-305 (1999) (passengers, as well as drivers, have a reduced expectation of privacy in cars traveling on the public thoroughfares); *Pennsylvania* v. *Labron*, 518 U.S. 938, 940 (1996) (per curiam) (noting "the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation").

the Fourth Amendment by weighing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). In *United States* v. *Martinez-Fuerte*, *supra*, the Court upheld the Border Patrol's use of permanent, fixed checkpoints on roads leading to the interior of the country. The Court found the "law enforcement needs served by checkpoints"—controlling the flow of illegal aliens and smuggling—to be "substantial[]," 428 U.S. at 556 & n.12, while "the consequent intrusion on Fourth Amendment interests is quite limited," *id.* at 557. The checkpoints' interference with legitimate traffic was "minimal," and the exercise of discretion by officers was controlled by the "regularized manner in which established checkpoints are operated." *Id.* at 559.

In *Michigan Department of State Police* v. *Sitz*, 496 U.S. 444 (1990), the Court upheld sobriety checkpoints at which cars were briefly stopped and drivers examined for signs of intoxication. Applying the "relevant authorities" of *Martinez-Fuerte* and *Brown* v. *Texas*, *id.* at 450, the Court noted that the "magnitude" of the State's interest in combating the problem of drunk driving was undisputed, *id.* at 451. On the other side of the ledger, the Court found, as it did in *Martinez-Fuerte*, that the intrusion on motorists stopped at sobriety checkpoints was "minimal." *Id.* at 452. While the Court made clear that no searching examination of the sobriety checkpoints' "effectiveness" was required in order to sustain them, *id.* at 454, the Court concluded that the ability of the checkpoints to advance the

States' interest was sufficient to strike the balance "in favor of the state program." *Id.* at 455.[3]

B. A Vehicle Checkpoint May Validly Be Established To Serve The Government's Interests Both In Drug Detection And In Motor Vehicle Regulation

Applying this Court's analysis in *Martinez-Fuerte* and *Sitz*, the checkpoints in this case are valid under the Fourth Amendment.

1. *The Interests Served By the Checkpoints Are Substantial.*

a. Indianapolis's checkpoints serve the unquestionably vital public interest in reducing the flow of illegal drugs, with its enormous attendant costs in human lives, social disorder, and related criminal violence. Like the problem of alien smuggling and immigration violations, there is a "veritable national crisis in law enforcement caused by smuggling of illicit narcotics," *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985), and "drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension," *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 669 (1989). "[T]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." *United States* v. *Place*, 462 U.S. 696, 703 (1983). The States' "interest in self-protection," *Von Raab*, 489 U.S. at 670, from the

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[3] Although the state courts had found sobriety checkpoints generally to be "ineffective," see *Sitz*, 496 U.S. at 448-449, 453, this Court held that the "decision as to which among reasonable alternative law enforcement techniques [to adopt] * * * remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id.* at 453-454.

influx of illegal narcotics thus is a substantial and weighty governmental concern.[4]

The pervasive problem of drug smuggling, like alien smuggling and other immigration offenses, has a close nexus to the usage of public roadways. Whether illegal drugs initially arrive in this country by boat, airplane, or foot, they at some point end up on the public roadways for national distribution. Cf. *Martinez-Fuerte*, 428 U.S. at 552 ("Once within the country, the aliens seek to travel inland * * * frequently meeting by prearrangement with friends or professional smugglers who transport them in private vehicles.").[5] Like alien smugglers, drug traffickers are lured by the speedy distribution that highways and interstates offer, and they are known to have preferred routes for transport-

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[4] The court of appeals stated (Pet. App. 10a) that "Indianapolis makes no attempt to defend its roadblocks on the basis that it is trying to exclude a harmful substance or dangerous persons[,] [t]hough that may be the ultimate aim, [instead] the City concedes that its proximate goal is to catch drug offenders in the hope of incapacitating them, and deterring others, by criminal prosecution." That analysis overlooks that, by arresting narcotics traffickers, confiscating contraband, and deterring others from engaging in similar smuggling efforts, Indianapolis's program does exclude drugs from the city.

[5] Border Patrol agents have advised us that, especially following the Mexican marijuana harvest in the Fall, there are times when they discover more narcotics than aliens smuggled in cars going through their checkpoints. The Border Patrol checkpoints at Las Cruces, New Mexico, reported 129 drug seizures from September through December 1997, valuing approximately $8.6 million. In the first three months of this year alone, those checkpoints made 104 seizures of $3.7 million worth of illegal narcotics.

ing their contraband.[6] Public roadways thus represent a critical link in the nationwide drug trafficking chain.

Also like illegal immigration, drug trafficking on the public roadways "poses formidable law enforcement problems." *Martinez-Fuerte*, 428 U.S. at 552. While law enforcement personnel can identify and stop some suspicious vehicles, as a general proposition "the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal [drugs]." *Id.* at 557. Drug traffickers, moreover, possess a "seemingly inexhaustible repertoire of deceptive practices and elaborate schemes," that includes "adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment." *Von Raab*, 489 U.S. at 669.[7] In particular, a requirement of particularized suspicion before cars could be stopped at a checkpoint "would largely eliminate any deterrent to the conduct of well-

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[6] See Pet. App. 12a ("The high hit rate of Indianapolis's roadblock scheme suggests that Indianapolis has placed the roadblocks in areas of the city in which drug use approaches epidemic proportions."); *State* v. *Damask*, 936 S.W.2d 565, 573 (Mo. 1996) (drug checkpoint on a road that "is known as a popular route for the transport of narcotics" upheld because it was designed "to discover problems predictably associated with persons who traveled these thoroughfares").

[7] See also *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980) (Powell, J., concurring) ("Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. * * * [M]any drugs * * * may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."); cf. *Florida* v. *Royer*, 460 U.S. 491, 519 (1983) (Blackmun, J., dissenting) ("The special need for flexibility in uncovering illicit drug couriers is hardly debatable. Surely the problem is as serious, and as intractable, as the problem of illegal immigration.").

disguised smuggling operations." *Martinez-Fuerte*, 428 U.S. at 557.

b. The checkpoint program also serves the secondary purpose of verifying driver's licenses and registrations. Pet. App. 44a. This Court has repeatedly indicated that checkpoints for license and registration verification are permissible under the Fourth Amendment, because they serve the States' "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." *Prouse*, 440 U.S. at 658; see also *id.* at 663. Similarly, in *Martinez-Fuerte*, the Court predicated its decision upholding checkpoints for illegal aliens in part on the existence and historical acceptance of license and registration stops. 428 U.S. at 560 n.14 ("Stops for questioning, not dissimilar to those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters.").[8]

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[8] The courts of appeals and highest state courts have unanimously sustained properly constituted license-and-registration checkpoints. See *Merrett* v. *Moore*, 58 F.3d 1547 (11th Cir. 1995), cert. denied, 519 U.S. 812 (1996); *United States* v. *Morales-Zamora*, 914 F.2d 200, 202-203 (10th Cir. 1990) (collecting cases); *United States* v. *McFayden*, 865 F.2d 1306 (D.C. Cir. 1989); *United States* v. *Prichard*, 645 F.2d 854 (10th Cir.) (license and insurance checkpoint), cert. denied, 454 U.S. 832 (1981); *LaFontaine* v. *State*, 497 S.E.2d 367 (Ga.), cert. denied, 525 U.S. 947 (1998); see also *Park* v. *Forest Serv.*, 205 F.3d 1034, 1040 (8th Cir. 2000) (allegations that checkpoint "consisted of an identification and registration check" do not describe an unconstitutional seizure); *United States* v. *Trevino*, 60 F.3d 333 (7th Cir. 1995), cert. denied, 516 U.S. 1061 (1996); cf. *State* v. *Rodriguez*, 877 S.W.2d 106 (Mo. 1994) (commercial vehicle inspection checkpoints); but see *State* v.

2. *The Intrusion on Liberty and Privacy Is Minimal.*

The overall intrusion on motorists' liberty and privacy interests at Indianapolis's checkpoint, as in *Martinez-Fuerte* and *Sitz*, is minimal. Officers first ask for the driver's license and registration. Pet. App. 53a.[9] That is a familiar and constitutional inquiry for traffic checkpoints. See p. 14, *supra*. The officers next check for signs of driver impairment, Pet. App. 53a, which is no more intrusive here than in *Sitz*. The officers also walk a narcotics- detection canine around the exterior of the vehicle *while* the license and registration are being checked. See Pet. 3; Pet. App. 57a. A sniff by a narcotics-detection dog of the publicly exposed exterior of personal effects is not a search. *United States* v. *Place*, 462 U.S. at 707 (dog sniff of luggage is not a search); see also *Class*, 475 U.S. at 114 ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'"). The dog makes its "observations from a public vantage point where [it] has a right to be." *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986); see also Pet. App. 40a. And motorists have no reasonable expectation of privacy in odors, particularly of contraband substances, emanating from their automobiles. Moreover, because the canine sniff is conducted on a car that has already been properly stopped for a license, registration, and sobriety check, the sniff itself should not expand the length of the detention at the checkpoint and thus does not entail an independent seizure of the vehicle and its occupants.

Larson, 485 N.W.2d 571 (Minn. Ct. App. 1992) (document checkpoint invalidated because officers had too much discretion).

[9] Indiana law requires drivers to display their license and registration upon the demand of a police officer. Ind. Code Ann. §§ 9-18-2-21(b)(2), 9-24-13-3 (Michie 1997).

Absent the development of individualized suspicion, the average length of the delay is two to three minutes. *Id.* at 38a, 57a. That is not discernibly longer than the time motorists are required to spend stopped at a toll booth on a busy day or at a traffic light at a busy intersection. See Fed. Highway Admin., *Traffic Control Devices Handbook* 4-100 (1983). It is shorter than the average time of the Border Patrol checkpoints upheld in *Martinez-Fuerte*. See 428 U.S. at 547 (three to five minute stop). The stipulated record reveals no inordinately intrusive questioning by officers nor visual inspection of the vehicle or passengers beyond "what can be seen without a search." *Id.* at 558.

The subjective intrusion on law-abiding motorists (*Sitz*, 496 U.S. at 452) is also minor. The police officers' actions are regularized and their discretion is closely cabined. The checkpoint locations are selected weeks in advance by high-level officials based on reasonable and objective criteria, such as crime statistics, traffic volume, and operational safety. Pet. App. 56a-57a; see also *Sitz*, 496 U.S. at 453; *Martinez-Fuerte*, 428 U.S. at 559. Cars are stopped on the basis of a predetermined, objective formula (such as every tenth car). Pet. App. 37a-38a, 54a, 57a; cf. *Sitz*, 496 U.S. at 453. The steps officers implement in the checkpoint procedure are also regimented, Pet. App. 37a-38a, 53a-54a, providing "visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest," *Martinez-Fuerte*, 428 U.S. at 559. Furthermore, the public is provided advance notice of the checkpoints' operation (but not precise location). Pet. App. 37a. On the roadways, lighted signs warn motorists as they approach the checkpoints. *Id.* at 57a; cf. *Martinez-Fuerte*, 428 U.S. at 545-546, 559 (because of signs, motorists "are not taken by surprise"). The

presence of marked police cruisers and uniformed officers demonstrates the checkpoints' official character. Pet. App. 57a. Consequently, the "motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Martinez-Fuerte*, 428 U.S. at 558.

3. ***The Checkpoints Are Highly Effective.***

Indianapolis's checkpoints are "spectacularly successful," Pet. App. 13a, with an arrest rate approaching ten percent, *id.* at 3a, 13a. Roughly half of those arrested were charged with driving offenses and the other half with drug offenses. *Ibid.* That effectiveness rate exceeds what this Court has sustained in earlier checkpoint cases. See *Sitz*, 496 U.S. at 455 (1.6% arrest rate for drunk drivers); *Martinez-Fuerte*, 428 U.S. at 554 (apprehension rates of 17,000 illegal aliens per ten million cars and 725 deportable aliens per 146,000 vehicles).

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Balancing those considerations, because Indianapolis's checkpoints serve substantial public interests, involve no greater degree of intrusion than this Court has previously held is permissible for vehicle checkpoints, and have proven to be a highly effective means of combating an intractable law enforcement problem on the public roadways, they are valid under the Fourth Amendment.

C. The Court Of Appeals Erred In Holding That The Checkpoint Program In This Case Is Invalid Because It Serves Law Enforcement Interests

The court of appeals acknowledged that, if Indianapolis's checkpoints were reviewed under this Court's checkpoint precedents, they "probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops," Pet. App. 3a, and "the strong national, state, and local policy of discouraging the illegal use of controlled substances," *id.* at 4a. The court held, however, that motor vehicle checkpoints must be justified on the basis of a "special need" other than enforcement of the criminal law. *Id.* at 5a. That is incorrect.

1. This Court's checkpoint cases foreclose any such requirement. In *Sitz*, the same claim was made that the sobriety checkpoints could be upheld only if predicated on "a showing of some special governmental need, beyond the normal need, for criminal law enforcement." *Sitz*, 496 U.S. at 450. But this Court found it "perfectly plain" that the Court's requirement of special needs beyond routine law enforcement in drug-testing cases

> was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, *supra*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown* v. *Texas*, *supra*, are the relevant authorities here.

Ibid. Similarly, in *Brown* v. *Texas*, this Court stated that the Fourth Amendment requires *either* that seizures be based on individualized suspicion "*or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers," without confining the latter to

special needs above and beyond general law enforcement interests. 443 U.S. at 51 (emphasis added).[10]

Sitz cannot be distinguished on the premise (Pet. App. 8a-9a) that sobriety checkpoints serve primarily a public-safety function. The record in *Sitz* established that "an arrest would be made" for any driver found intoxicated at the checkpoint. 496 U.S. at 447. While those arrests simultaneously performed the functions of enforcing the criminal law and promoting public safety by removing drunk drivers from the road, the checkpoints at issue here also serve significant public-safety ends by removing drugs from their primary distribution network and thus averting the human and societal toll that their trafficking and usage exacts.

Martinez-Fuerte further establishes that the social harms to be advanced by a checkpoint program are not confined to traffic safety or regulatory ends. There, the checkpoints directly enforced the criminal prohibitions on alien smuggling and illegal entry, which this Court characterized as a "significant law enforcement need[]." *Martinez-Fuerte*, 428 U.S. at 555. Indeed, each of the defendants in *Martinez-Fuerte* had been prosecuted. *Id.* at 547-550. Running through the opinion, moreover, is a recognition of the vital role checkpoints play in addressing the "formidable law enforcement problems" posed by illegal-alien traffic. *Id.* at 552, 556-557 & n.12.

Nor can *Martinez-Fuerte* be distinguished, as the court of appeals suggested (Pet. App. 10a), on the basis

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[10] See also *Prouse*, 440 U.S. at 654-655 ("In those situations in which the balance of interests precludes insistence upon some quantum of individualized suspicion, other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.") (footnote and internal quotation marks omitted).

that the Border Patrol's checkpoints promoted essentially the "regulatory purpose" of deporting illegal aliens. While the *passenger* aliens found in a stopped automobile may be administratively deported rather than prosecuted, the car's *driver*, whose Fourth Amendment rights are directly implicated by the stop, is "routinely prosecute[d]" by the government. *Martinez-Fuerte*, 428 U.S. at 553 n.9. Furthermore, this Court rejected precisely such an administrative/law enforcement distinction in *Martinez-Fuerte*. See *id.* at 560 n.14 ("The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel.").

The court of appeals also suggested (Pet. App. 9a) that *Martinez-Fuerte* is irrelevant because the checkpoints in that case were founded upon the federal government's unique authority over foreign relations and immigration. This Court, however, did not rest its analysis on an immigration-authority exception to the Fourth Amendment. Nor would such a rationale have merit, given that Border Patrol checkpoints occur as far as 100 miles away from the border and often are situated in locations where metropolitan areas interrupt the traffic flow from the border. In any event, apart from intrusions at the border, see *Montoya de Hernandez*, 473 U.S. at 537-538; *United States* v. *Ramsey*, 431 U.S. 606, 616 (1977), the Fourth Amendment imposes the same constraints on the federal government and the States. Thus, while immigration control furnished the particular interest in *Martinez-Fuerte*, States also may establish checkpoints to serve their own weighty interest in regulating narcotics smuggling on public roads.[11]

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[11] The court of appeals' contention that checkpoint stops must rest on "concerns other than crime detection," Pet. App. 5a

2. The rationale for requiring "special needs" beyond routine law enforcement in other contexts has no application to the checkpoints operated in this case. The drug testing cases, for example, involve both a search and seizure of an individual, and one that implicates a uniquely personal activity.[12] If such personal intrusions were permitted for routine crime detection, it would do much to undermine the general principle of Fourth Amendment law that intrusions on the person require some individualized suspicion. By contrast, the "practice of stopping automobiles briefly for questioning" at a checkpoint involves only a brief seizure and no search; it "has a long history evidencing its utility"; and it "is accepted by motorists as incident

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(citation and emphasis omitted), also conflicts with the court's own view (*id.* at 5a-6a) that roadblocks to detect fugitives or threatened violations of criminal laws are permissible. Such roadblocks plainly advance criminal law enforcement needs. While they also may address particular exigencies in preventing crimes or escapes, drug seizures likewise terminate further criminal activity involving both the smuggler and the drugs and may thereby avert the violence that pervades drug trafficking and drug usage.

[12] See *Bond* v. *United States*, 120 S. Ct. 1462, 1464 (2000) ("Physically invasive inspection is simply more intrusive than purely visual inspection."); *Houghton*, 526 U.S. at 303 (cases involving "the unique, significantly heightened protection afforded against searches of one's person" do not govern searches during automobile stops); *Skinner* v. *Railway Labor Exec. Ass'n*, 489 U.S. 602, 617 (1989) ("There are few activities in our society more personal or private than the passing of urine."); cf. *United States* v. *Ortiz*, 422 U.S. 891, 895 (1975) (because a traffic stop is "considerably less intrusive than a search," suspicionless checkpoints may be appropriate for the former but are not for the latter).

to highway use." *Martinez-Fuerte*, 428 U.S. at 561 n.14.[13]

D. The Checkpoint In This Case Is Valid Because It Is Objectively Justified By Its Secondary Purpose To Check Driver's Licenses And Registrations

The court of appeals did not find Indianapolis's checkpoint program unconstitutional because of anything the officers did in implementing the checkpoints. Instead, the court's decision turned upon its conclusion that "the purpose behind the [checkpoint] program is critical to its legality," Pet. App. 10a (emphasis omitted), and that Indianapolis was "concern[ed] * * * primarily with catching crooks," *id.* at 8a. But even were the Court to conclude that an interest in narcotics-detection is insufficient to support a checkpoint program, the checkpoints in this case are adequately supported by their valid "secondary purpose" (*id.* at 44a) to check driver's licenses and vehicle registrations.

1. The district court found—and the court of appeals did not disagree—that Indianapolis's checkpoints had two purposes, the primary purpose of narcotics interdiction and the secondary purpose of enforcing the drivers' license and registration laws. Pet. App. 44a.

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[13] The court of appeals' reliance (Pet. App. 5a) on *Chandler* v. *Miller*, 520 U.S. 305 (1997), was also misplaced. In *Chandler*, the Court stated that an exception to the ordinary requirement of individualized suspicion for a search may exist when "'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion." *Id.* at 314. But, as the dissenting opinion noted (Pet. App. 16a), *Chandler* acknowledged (520 U.S. at 308) this Court's decisions in *Martinez-Fuerte* and *Sitz*—both of which involved checkpoints that, at least in part, served crime detection interests. Further, in *Sitz*, the Court made clear that "special needs" analysis does not apply to vehicle checkpoints. See p. 18, *supra*.

Because the constitutional validity of that secondary purpose is unquestioned and because the scope of the entire seizure was a permissible means of accomplishing that purpose, the checkpoints are valid under the Fourth Amendment regardless of their additional, narcotics-detection purpose. Where one of the purposes served by a vehicle checkpoint serves the important public interests that this Court has held justify such operations and where the checkpoint's additional purpose(s) do not alter the length or intrusiveness of the seizure, the existence of multiple purposes does not raise a Fourth Amendment problem. Cf. *Horton* v. *California*, 496 U.S. 128, 138 (1990) ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement."); see also *Merrett* v. *Moore*, 58 F.3d 1547, 1550-1551 (11th Cir. 1995), cert. denied, 519 U.S. 812 (1996).

To illustrate, the checkpoints at issue in *Sitz* and *Martinez-Fuerte* had significant law-enforcement components. Yet this Court sustained them without quantifying or weighing the dual law enforcement and public interest components of those checkpoints' purposes. In fact, in *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983), this Court held that the Customs Service's "substantial" "governmental interest in assuring compliance with documentation requirements" is "particularly" *enhanced*, not diminished, when enforced "in waters where the need to deter or apprehend smugglers is great." *Id.* at 593.

Furthermore, a constitutional rule for multi-purpose checkpoints that turns upon which purpose is "primary" and which purpose is "secondary" is unworkable. From

the vantage point of the individual who is stopped, the intrusion is identical whether a license-and-registration checkpoint is supplemented with a drug-detection canine for the subsidiary purpose of narcotics control, or whether a narcotics-interdiction checkpoint serves the subsidiary goal of checking driver's licenses, registrations, and sobriety. In either case, officers may establish checkpoints with highly regulated protocols that include a brief stop, a check of license and registration, and examination of the vehicle's exterior by a drug-detection dog. There is no apparent basis for invalidating one practice while upholding the other. Nor would there be a jurisprudentially practicable way for courts to determine which purposes predominated for particular checkpoints. Law enforcement agencies may establish programs without clearly labeling (or prioritizing) the purposes they serve. And the reasons for maintaining a mixed-purpose checkpoint may vary over time and as public office holders change. The result under the Fourth Amendment should not depend on such inquiries.[14]

2. a. A focus on the objective characteristics, rather than subjective purposes, of a particular checkpoint is consistent with general principles in Fourth Amendment analysis. "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of

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[14] See *Whren* v. *United States*, 517 U.S. 806, 815 (1996) ("We cannot accept that the search and seizure protections of the Fourth Amendment are so variable * * * and can be made to turn upon such trivialities."); *Massachusetts* v. *Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting from dismissal of certiorari) ("[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.").

an officer's actions in light of the facts and circumstances then known to him." *Scott* v. *United States*, 436 U.S. 128, 137 (1978).

> [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

Id. at 138.[15]

That rule equally applies to searches and seizures involving traffic or transportation offenses. In *Whren* v. *United States*, 517 U.S. 806 (1996), this Court unanimously held that a traffic stop for the commission of a civil traffic infraction is reasonable, regardless of the officers' underlying motivation to search the car for drugs. *Id.* at 813-815; see also *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996). In *Brower* v. *County of Inyo*, 489 U.S. 593 (1989), this Court refused to consider the subjective intent of police officers in determining whether a roadblock to stop a fleeing suspect constituted a seizure. *Id.* at 598-599. Similarly, in *United States* v. *Robinson*, 414 U.S. 218, 236 (1973), the Court held that an objectively reasonable arrest for a traffic violation justified a search incident to arrest for weapons and

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[15] See also *Bond*, 120 S. Ct. at 1465 n.2 ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment * * *; the issue is not his state of mind, but the objective effect of his actions," even where the officer lacks individualized suspicion.); *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) ("prior cases make clear" that the "subjective motivations of the individual officers * * * ha[ve] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment").

evidence, whether or not the officer had any objective or fact-specific concern for his safety.[16]

There is no sufficient reason to adopt a different approach for checkpoints. The *Brown* v. *Texas* balancing test, which generally applies to checkpoint stops, see *Sitz*, 496 U.S. at 450, weighs purely objective factors. It looks first at "the gravity of the public concerns *served by* the seizure," *Brown*, 443 U.S. at 51 (emphasis added), not at what primary concerns prompted adoption of the checkpoint program. In this case, there can be no serious dispute that, whatever the intent of the Indianapolis officials who adopted the checkpoint program, the checkpoints served the important public interest in ensuring that only properly licensed and sober drivers in registered cars occupied the public roadways. Those were the first things the officers checked for at the roadblocks, those activities alone defined the temporal and physical scope of the seizure, and those offenses accounted for nearly half of the arrests made.

The second and third *Brown* v. *Texas* factors—the effectiveness of the checkpoints and the severity of the interference with individual liberty—are also quintessentially objective inquiries. The former often focuses on statistical success rates. See *Sitz*, 496 U.S. at 455; *Martinez-Fuerte*, 428 U.S. at 553-554. And the intrusiveness of the seizure from the individual's

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[16] See also *Villamonte-Marquez*, 462 U.S. at 584 n.3 (upholding a brief, suspicionless detention of a ship for a documentation check regardless of the agents' ulterior motive to detect illegal drugs); *Horton*, 496 U.S. at 138-139 (observation of items in plain view need not be inadvertent).

standpoint turns on what officers actually do, not on what supervisory officials think.[17]

b. The court of appeals found (Pet. App. 10a) a difference of constitutional magnitude between the subjective purpose of individual officers implementing the checkpoint, the consideration of which is impermissible, and the aggregated purpose of those law enforcement officials who designed the checkpoint, the consideration of which it deemed controlling. But if the purpose of the officers actually executing the seizure is irrelevant, there is no Fourth Amendment justification for making dispositive the relative weights that the program's originators attach to the checkpoints multiple purposes.[18] It would make little sense for courts to invalidate otherwise constitutional checkpoint seizures simply because the public officials in a particular jurisdiction listed their purposes in the "wrong" order in a press release or policy memorandum.

Nor is a purpose inquiry necessary to prevent "dragnet search[es] for criminals." Pet. App. 10a. "Scrupulous adherence" to the existing objective limitations on checkpoint seizures will accomplish that goal. *Horton*, 496 U.S. at 140. As noted above, the justification for checkpoints is confined to *stops* of motor vehicles on public roadways because of their unique Fourth

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[17] The highway signs in this case warned drivers only of a "narcotics checkpoint." But the content of the warning signs did not significantly influence the nature or degree of the intrusion. Such warnings are not constitutionally compelled. See *Sitz*, 496 U.S. at 447-448 (no indication that warning signs were present). And the warnings here would be unlikely to generate "fear and surprise * * * in law abiding motorists." *Id.* at 452.

[18] See *Whren*, 517 U.S. at 815 (it is "somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement").

Amendment status, and thus does not permit seizures of pedestrians or searches of persons or cars. There is also a practical limitation both on what crimes have a sufficiently pervasive connection to the roadways to make it sensible to commit law-enforcement resources to checkpoints and what crimes can be policed effectively through plain view inspections or canine sniffs in the brief detention time permitted for checkpoint seizures. Finally, "the expense to law enforcement agencies and public intolerance of the inconvenience impose a check on unreasonable recourse to this power." 4 Wayne R. LaFave, *Search and Seizure* § 9.6(a), at 311 (3d ed. 1996); see also *id.* § 10.8(d), at 693.

c. The court of appeals also erred in relying (Pet. App. 11a) on this Court's dicta in *Whren*, *supra*, that "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes," 517 U.S. at 811-812 (emphasis omitted). Even assuming that this language applies to checkpoint stops, which are not conducted for administrative or inventory purposes and which entail limited seizures not searches, it does not cast doubt on the validity of Indianapolis's checkpoints.

First, one reason to question putatively administrative or inventory searches when they are made for law-enforcement purposes is that those searches of persons' homes and business premises, or of automobiles already entirely within police custody, normally would require the highest level of protection under the Fourth Amendment: a warrant or probable cause. Brief automobile stops, by contrast, do not typically require that level of justification, even outside the checkpoint context. See, *e.g.*, *United States* v. *Sharpe*, 470 U.S. 675

(1985) (investigatory stop of a vehicle justifiable on reasonable suspicion); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975) (same). And checkpoint procedures provide an objective level of regularity that protects against arbitrary action by law enforcement officers, without any need to scrutinize the official purpose. See *Brown* v. *Texas*, 443 U.S. at 51; *Prouse*, 440 U.S. at 663.

Second, and in any event, the Court has never invalidated an otherwise-justified administrative or inventory search by finding that there also was an underlying law-enforcement purpose. Administrative and inventory searches must be guided by objective limitations on the police officers' behavior.[19] Those limits substitute for the traditional probable cause requirement. Once such objective limitations are in place, however, and the general interests served by administrative and inventory searches are furthered by the practice in question, the existence of additional, important governmental purposes for a particular practice should not provide a basis for invalidating it under the Fourth Amendment.[20]

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[19] See *New York* v. *Burger*, 482 U.S. 691, 702-703 (1987) (administrative search must "further" a "'substantial' government interest" and must be "carefully limited in time, place, and scope"); *Colorado* v. *Bertine*, 479 U.S. 367, 372 (1987) ("standardized procedures" required for vehicle inventories); *Barlow's*, 436 U.S. at 323 ("neutral criteria"); *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967) ("reasonable legislative or administrative standards" must govern administrative searches).

[20] The court of appeals further erred in relying (Pet. App. 11a) on the plurality's pretext language in *Texas* v. *Brown*, 460 U.S. 730, 743 (1983). That language arose entirely in that portion of the opinion addressing the requirement in the law at that time that evidence in plain view be discovered inadvertently. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971). This Court dispensed

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
KARIN B. HOPPMANN
MICHAEL A. ROTKER
Attorneys

MAY 2000

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with that requirement seven years later. *Horton*, 496 U.S. at 138-142.

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

(6)

No. 99-1030

IN THE
Supreme Court of the United States

CITY OF INDIANAPOLIS, *et al.*,

Petitioners,

v.

JAMES EDMOND, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF THE CITY OF INDIANAPOLIS, ET AL.

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(Counsel of Record)
JARED S. MAAG
Assistant Attorney General
120 S.W. 10th Avenue, 2nd Fl.
Topeka, Kansas 66612-1597
(786) 296-2215

Counsel for Kansas and the Amici States

[Additional Counsel Listed After Conclusion]

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INTERESTS OF THE *AMICI* STATES

The States have a significant interest in preventing drug trafficking, not only within their respective borders, but throughout the nation as a whole. Towards that end, drug roadblocks have proven to be an effective means of slowing and interrupting the ever increasing flow of illegal narcotics that pass along major drug corridors[1] and city streets.[2]

Thus, the constitutionality of such measures under the Fourth Amendment is important to the States in their ongoing efforts at drug interdiction. To date, both state and federal courts have issued differing opinions on the legality of such

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[1] In particular, two major drug corridors run through Kansas, I-35 (north-south) and I-70 (east-west). *United States v. Klinginsmith*, 25 F.3d 1507, 1510 n.1 (10th Cir. 1994) ("I-35 is a known avenue for drug transportation"); *United States v. Sanchez*, 866 F. Supp. 1542, 1554 (D. Kan. 1994) (Defendant's rental van was traveling on I-70, a known drug trafficking route).

[2] For a statistical analysis of both arrests and seizures in the United States see Drug Enforcement Administration, U.S. Department of Justice, *Drug Statistics* (visited Apr. 21, 2000) <http://www.usdoj.gov/dea/stats/drugstats.htm> (current through June 14, 1999). For further statistics see also Bureau of Justice Statistics, U.S. Department of Justice, *Drug & Crime Facts* (last modified Apr. 7, 2000) <http://www.ojp.usdoj.gov/bjs/dcf/contents.htm> (summarizing U.S. statistics about drug-related crimes, law enforcement, courts, and corrections from Bureau of Justice Statistics (BJS) and non-BJS sources); National Archive of Criminal Justice Data (visited Apr. 21, 2000) <http://www.icpsr.umich.edu/NACJD/home.html> (provides browsing and downloading access to over 500 data collections relating to criminal justice); Office of National Drug Control Policy (last modified Apr. 4, 2000) <http://www.whitehousedrugpolicy.gov> (cross-disciplinary reference to facts and figures organized by specific drug type. Also includes statistics on prevalence and consequences of drug use, adjudication of drug offenders, and production, trafficking, and distribution patterns taken from federal and state government publications), and 1998 FBI Uniform Crime Report for the United States.

roadblocks.[3] Consequently, some states are given the authority to implement a system of roadblocks while other states must forgo that opportunity. This case provides the Court with an opportunity to determine the constitutionality of at least some of these roadblocks.

SUMMARY OF THE ARGUMENT

In *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), this Court stated that "reasonableness" is the ultimate question when addressing situations involving checkpoint "seizures." *Id.* at 450. In doing so, the Court rejected any notion that a balancing analysis must be predicated on a showing of some special governmental objective beyond the general need for criminal law enforcement. *Id.* at 449-50. The reasonableness of drug roadblock checkpoints therefore turns on the balancing test established in *Brown v. Texas*, 443 U.S. 47 (1979), which directs that, in considering the constitutionality of "less intrusive seizures," a court must weigh (1) the "gravity of the public concerns served by the seizure," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty." *Id.* at 50-51. (citation omitted). Applying *Brown* to drug roadblocks yields the conclusion that this effective law enforcement technique is constitutional, at least in many circumstances.

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[3] *Compare United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998); *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992); *Galberth v. United States*, 590 A.2d 990 (D.C. 1991); and, *Commonwealth v. Rodriguez*, 722 N.E.2d 429 (Mass. 2000), each holding drug roadblocks to violate the Fourth Amendment, *with Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995); *State v. Damask*, 936 S.W.2d 565 (Mo. 1996) (en banc); and *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), which held these types of roadblocks to be legal. *Cf. Wilson v. Commonwealth*, 509 S.E.2d 540, 29 Va. App. 63 (1999) (insufficient evidence presented to support public concern prong of *Brown* for particular checkpoint; however, checkpoints not per se unconstitutional).

First, given the magnitude of the illegal drug trafficking problem throughout the United States, and its association with criminal activity of all sorts, the public concern over minimally intrusive drug roadblocks is a rhetorical question at best. Second, the public interest is best served by law enforcement techniques that effectively stem the tide of an illicit trade which affects both directly and indirectly every citizen, while balancing each citizen's right to be free from "unreasonable" seizures. Finally, the intrusive nature of these roadblocks is clearly minor. In short, there is no reason for the Court to deviate from the principle announced in both *Sitz* and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), that the intrusion on motorists during similar type roadblocks is both "slight" and "quite limited," *Sitz*, 496 U.S. at 451; *Martinez-Fuerte*, 428 U.S. at 557, when the exchanges during the roadblocks in question are virtually identical.

Simply put, the issue is one of reasonableness, and given the circumstances surrounding the implementation of drug roadblocks for interdiction purposes, no justifiable basis exists for the Court to depart from its well-established precedent that already essentially declares these roadblocks "reasonable" under the Fourth Amendment.

ARGUMENT

I. DRUG ROADBLOCKS ARE CONSTITUTIONAL IF THEY ARE REASONABLE.

The Fourth Amendment prohibits only "unreasonable" searches and seizures.[4] *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). Thus, as a general rule,

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[4] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized." U.S. CONST. amend. IV.

either probable cause or individualized suspicion is necessary to seize an individual suspected of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). Individualized suspicion, however, is not necessary in a roadblock scenario where the Court has required only a reasonableness analysis that balances a motorist's Fourth Amendment protections against the interests of the State. *Martinez-Fuerte*, 428 U.S. at 555. Applying that standard, this Court has routinely found, in a checkpoint context, that the public interest in detecting various forms of criminal activity outweighs any potential interference with individual liberty.

In 1976, this Court first addressed the suspicionless seizure of individuals at a United States Border Patrol checkpoint positioned to detect the illegal importation of immigrants into the United States. *United States v. Martinez-Fuerte*, 428 U.S. 543. The Court ultimately found that the United States had a legitimate interest in preventing the entry of illegal immigrants and that requiring individualized suspicion would be impractical given the flow of traffic and the inability of officers to reasonably identify those who are transporting illegal aliens. *Id.* at 557. The Court concluded that the roadblocks involved were minimally intrusive, that they served a legitimate public interest, and that the record before the Court supported the need for this particular technique. *Id.* at 562.

Some three years later, this Court in *Brown v. Texas*, 443 U.S. 47, established a framework for evaluating the constitutionality of roadblocks. *Id.* at 50-51. In addressing these "less than intrusive" seizures, the Court found that the reasonableness of the stop was dependent upon three factors: (1) the "gravity of the public concerns served by the seizure," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty." *Id.* (citation omitted). The reasonableness

of the checkpoint stop in light of these factors therefore is the determinative issue.

Eleven years later, this Court reinforced the proposition that reasonableness is at the core of any roadblock issue in *Michigan Department of State Police v. Sitz*, 496 U.S. 444. There, respondent maintained that some special governmental need "'beyond the normal need' for criminal law enforcement" must exist before a balancing analysis is employed. *Id.* at 450. The Court, however, soundly rejected the "special governmental need" requirement, finding *Martinez-Fuerte* and *Brown* to be the relevant authorities for an analysis of roadblocks under the Fourth Amendment. *Sitz*, 496 U.S. at 450.

As the drug roadblock in question in this case and those utilized by the States are virtually identical in both purpose and design to the roadblocks upheld in *Brown*, *Martinez-Fuerte*, and *Sitz*, there is no reason for this Court to deviate from the well-established reasonableness analysis applied in those cases.

The Seventh Circuit majority abandoned this straightforward analysis in holding Indianapolis's roadblock system unconstitutional. That court chose to analyze the reasonableness of the roadblock simply on the determination of whether "there is a basis for believing that a particular search or seizure . . . will yield evidence or fruits or instrumentalities of crime." *Edmond v. Goldsmith*, 183 F.3d 659, 665 (7th Cir. 1999). This decision to probe the "*purpose* behind the *program*" resulted in the lower court impermissibly focusing on the state of mind of those who established the checkpoint. *Id.* (emphasis added). Such an approach disregards this Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), that there is no constitutional authority for judging the legitimacy of a traffic stop by assessing the actual motivations of the officers

involved. *Id.* at 811-13.[5] Indeed, this Court warned against the adoption of such a subjective test as it would necessitate individual inquiry into police activity, thus compromising the invariable nature of the protections embodied in the Fourth Amendment. *Id.* at 815.[6] Accordingly, any reasonableness evaluation of a particular roadblock must be made not from the subjective standpoint of the officers but rather objectively. *Id.* at 813.[7]

The proper test for the constitutionality of these particular roadblocks therefore is the balancing test of *Brown v. Texas*.[8]

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[5] This principle was reiterated in this Court's recent decision in *Bond v. United States*, 120 S. Ct. 1462, 1465 n.2 (2000) ("the issue is not [the officer's] state of mind, but the objective effect of his actions.").

[6] The Court concluded that "police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable." *Whren v. United States*, 517 U.S. at 815. (citations omitted).

[7] On this very point, the Court stated that "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, *viewed objectively*, justify that action.'" *Whren*, 517 U.S. at 813 (citation omitted) (emphasis added).

[8] The *Brown* balancing analysis has been used in other checkpoint contexts. Several courts, in challenges to fish and game checkpoints, employ *Brown* for a constitutionality assessment. *See, e.g., State v. Albaugh*, 571 N.W. 2d 345, 347, 1997 N.D. 229 [8] (N.D. 1997) (listing cases).

II. UNDER THE *BROWN* BALANCING TEST, DRUG ROADBLOCKS ARE CONSISTENT WITH THE FOURTH AMENDMENT.

A. DRUG ROADBLOCKS ADDRESS A SERIOUS PUBLIC CONCERN.

It is unquestionable that the illicit drug trade which operates throughout the United States tears at the very fabric of society.[9] This is illustrated not only by the increasing number of arrests,[10] but by the expansion of laws designed to limit both the proliferation and use of drugs.[11] The inextricable link to other areas of criminal activity is also readily apparent.[12]

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[9] An estimated $67 billion dollars is spent annually on the social costs of illegal drugs. United States General Accounting Office, *Drug Control - Observations on Elements of the Federal Drug Control Strategy,* 1997 WL 208098 (F.D.C.H. Mar. 14, 1997).

[10] Between 1980 and 1989 *national* drug arrests increased by 134%. Bureau of Justice Assistance, U.S. Dep't of Justice, Pub. No. NJC-144531 Program Brief: Special Drug Courts 1 (1993). Between 1989 and 1998 drug abuse violations increased 19.6%; for those under 18 years of age there was an 85.6% increase in arrests for drug violations. In 1998 alone there were 1,559,100 drug arrests, the highest rate among the 14.5 million arrests that year. 1998 FBI Uniform Crime Rep. for the United States 209-15.

[11] See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified as amended in scattered titles of the U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of titles 18, 21, and 31 of the U.S.C.); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4312 (1988) (codified as amended in title 21 U.S.C. and in scattered sections of the U.S.C.).

[12] "For example, 15,377 of the 22,540 murders in the United States in 1992 were committed with firearms, of which 1,144 concerned drugs" *United States v. Condren,* 18 F.3d 1190, 1198 (5th Cir. 1994) (citing 1992 FBI Uniform Crime Rep. for the United States 20). Between 1994 and 1998 the total number of murder victims for whom supplemental homicide information was available equaled 89,208. Of that number 4,594 (5.1%)

Acknowledging this fact, the Court in *United States v. Mendenhall,* 446 U.S. 544 (1980), observed that:

> "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."

Id. at 561-562. (Powell J., concurring).

Narcotics trafficking is "one of the greatest problems affecting the health and welfare of our population," *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 668 (1989), causing a "veritable national crisis in law enforcement. . . ." *United States v. Montoya de Hernandez,* 473 U.S. 531, 538 (1985). See also *Florida v. Royer,* 460 U.S. 491, 513 (1983) (Blackmun J., dissenting).

Increased use and distribution of particular narcotics has further defined the war on drugs over the past two decades. Whereas crack cocaine drove the drug policies of the mid 1980's, the emergence of methamphetamine will likely garner the lion's share of the attention in today's war.[13] These facts

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involved narcotic drug laws; 813 (.09%) involved brawls due to the influence of narcotics. 1998 FBI Uniform Crime Rep. for the United States 21.

[13] The recent focus by the federal government on methamphetamine is an obvious reaction to the increased use of this particular drug. The sharp incline has led some experts to conclude that methamphetamine may be become the most frequently abused intravenous drug. Paul V. Konovalov, Note, *On a Quest for Reason: A New Look at Surreptitious Search*

are important if only to reinforce the rise in a phenomena that the courts are all too familiar with.

In sum, there is simply no debate over the impact of illegal drugs in the United States. The lack of a dispute therefore gives rise to the argument that narcotics trafficking parallels, if not exceeds, the concern over the problem addressed in *Sitz*. 496 U.S. at 451. It would seem inherently contradictory for the Court to determine that the public's concern over narcotics trafficking exists on a level far removed from that of eradicating the nation's drunken driving problem based solely on a separate degree of urgency, as the Seventh Circuit majority essentially did. *See Edmond*, 183 F.3d at 663 (No urgent consideration of public safety is shown with Indianapolis's drug roadblock). The concern over narcotics trafficking is simply not minimized by an argument that the effects are not as immediate or dramatic as that of accidents involving alcohol.

To the extent that this Court has found the nation's drunk driving epidemic to satisfy the first *Brown* factor, the same result must follow for a problem that parallels and exceeds that of drunk driving on our nation's highways.

B. DRUG ROADBLOCKS EFFECTIVELY ADVANCE THE PUBLIC INTEREST.

In addressing the *Brown* effectiveness factor, a substantial degree of deference is paid to law enforcement officials who develop the particular roadblocks. The Court in *Sitz* emphasized that *Brown* did not imbue the courts with the

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Warrants, 48 Hastings L.J. 435, 437-38 n.18 (1997). See also, Matt Bai, *White Storm Warning: In Fargo and the Prairie States, Speed Kills*, NEWSWEEK, Mar. 31, 1997, at 66-67 ("[A]n alarming amount of meth is now being made in local 'labs' - bathtubs and closets where anyone with a high-school knowledge of chemistry, and access to hundreds of recipes on the Internet, can cook up a batch himself.").

power to decide "which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S. at 453. Towards that end, the courts cast aside any role in determining reasonable alternatives, leaving the choice to those officials who possess the unique understanding of the resources needed to combat a particular problem.[14] *Id.* at 453-54.

It certainly follows from this line of reasoning that an absolute number of arrests from any particular roadblock need not be achieved under the second *Brown* factor. Indeed, this Court has historically accepted low "hit rates" in approving checkpoints. *See Martinez-Fuerte*, 428 U.S. at 554 (0.12% arrest rate); *Sitz*, 496 U.S. at 458 (126 stops, 2 arrests, a 1.6% arrest rate).[15] Various factors contribute to the overall success rate during any given checkpoint. In practical terms, law

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[14] For example, the 43rd precinct in the Bronx set up a checkpoint during the spring and summer of 1992 in response to an escalation of street crime, including four drive by shootings. In reviewing the basis for this checkpoint, the Second Circuit found that "at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter criminal behavior in the barricaded area." *Maxwell v. City of New York*, 102 F.3d 664, 667 (2nd Cir. 1996).

[15] As a further example of "hit rates," in July of 1992, Minnesota officials established a narcotics checkpoint on Interstate 35W south of Minneapolis. Between 7:00 p.m. and 11:00 p.m. approximately 650 cars passed through the checkpoint. Of that number approximately 50 cars were diverted for further questioning resulting in a total of seven individuals being cited for narcotics violations, a hit rate of 1.07%. Chris Braeske, *The Drug War Comes to a Highway Near You: Police Power to Effectuate Highway "Narcotics Checkpoints" Under the Federal and State Constitutions*, 11 Law & Ineq. J. 449, 450-51, 463 (1993). In *State v. Damask*, 936 S.W.2d 565 (Mo. 1996), it was reported that in a checkpoint set up along I-44 in Franklin County, Missouri 66 vehicles passed through and 10 vehicles were searched resulting in one arrest, *id.* at 568, a hit rate of 1.5%. Likewise, in *Merrett v. Moore*, 58 F.3d 1547, 1551 (11th Cir. 1995), the Court, in reviewing a "mixed-motive" roadblock, reported a 4.6% vehicle citation rate.

enforcement will likely expect increased or decreased hit rates depending on the location of the checkpoint. In the matter before this Court, a drug hit rate of 5% resulted from checkpoints established within the city limits of Indianapolis. *Edmond*, 183 F.3d at 661. Indianapolis achieved an overall hit rate of 9% when arrests for non-drug related crimes are included. *Id.* Thus, targeting a drug rich environment will likely result in a much higher success rate than checkpoints set up in other locations.[16]

However, the general focus of the effectiveness prong under *Brown* turns not on the numbers achieved but on whether the checkpoint advances the public's interest. *Merrett v. Moore*, 58 F.3d 1547, 1551 (11th Cir. 1995). In the context of mixed-motive roadblocks, safety concerns are generally the guideposts. *Id.*; *Sitz*, 496 U.S. 444. Thus, in checkpoints established to ensure compliance with traffic and motor vehicle laws, the state's interest is sufficiently advanced. *Delaware v. Prouse*, 440 U.S. 648, 658 (1979). The same is true of DUI roadblocks. *Sitz*, 496 U.S. at 455. The mere presence of an alternative or additional motivation behind the checkpoint does not then make it illegitimate.[17] Again, ulterior motives do not invalidate objectively justifiable police conduct. *Whren*, 517 U.S. at 811.

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[16] In *Damask*, the I-44 location was targeted as a known drug route, a fact the Missouri courts had taken judicial note of. *State v. Burkhardt*, 795 S.W.2d 399, 405 (Mo. 1990) (en banc); *State v. Joyce*, 885 S.W.2d 751, 752 (Mo. Ct. App. 1994).

[17] For instance, the presence of a K-9 unit at a roadblock designed to check registration or sobriety fails to implicate any Fourth Amendment concerns. *United States v. Place*, 462 U.S. 696, 707 (1983). Thus, a checkpoint that has been lawfully established cannot then be found constitutionally infirm merely because the state may have the additional purpose of intercepting smuggled narcotics. *Merrett*, 58 F.3d at 1551.

In a situation where other motivations are absent and the establishment of the checkpoint is premised solely on drug detection, the state's interest is certainly advanced. Granted, other law enforcement means exist to detect and seize narcotics, but drug roadblocks substantially advance the states' interest in detecting large shipments of drugs and the very flow of those shipments. The success of the drug trade is dependent upon large scale smuggling by "couriers" or "mules" who traverse the country's roadways — such as I-70 and I-35 across Kansas — carrying substantial amounts of narcotics. Thus, checkpoints provide law enforcement with a reasonably effective means of discovering contraband given that "the flow of traffic tends to be too heavy to allow the particularized study of a given car." *Martinez-Fuerte*, 428 U.S. at 557. As in *Martinez-Fuerte*, the purpose of the checkpoints in question is legitimate and in the public interest. *Id.* at 562. Roadways are the lifeline of the narcotics industry. Stifling an effective means of suppressing the flow of narcotics on those roadways simply because the checkpoint is drug related "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations." *Id.* at 557.

The public's interest in drug eradication is advanced through the implementation of either single or mixed-motive checkpoints. Indeed, these checkpoints provide reasonable methods of narcotics interdiction, while according proper respect to an individual's rights under the Fourth Amendment. The *Brown* effectiveness prong is therefore satisfied in this instance.

C. DRUG ROADBLOCKS DO NOT SUBSTANTIALLY INTERFERE WITH INDIVIDUAL LIBERTY.

The third *Brown* factor is the extent to which a drug roadblock intrudes upon the individual liberty of a motorist, both objectively and subjectively. In this context, the particulars of each roadblock are important in evaluating both

"the duration of the seizure and the intensity of the investigation" and the "fear and surprise engendered in law-abiding motorists by the nature of the stop." *Sitz*, 496 U.S. at 452. In addition, the degree to which the checkpoint interferes with legitimate traffic and the discretion afforded the officers will further define the checkpoint's constitutionality. *Martinez-Fuerte*, 428 U.S. at 558-59.

The similarities between the roadblocks at issue here and those approved by the Court on prior occasions lead to the conclusion that the intrusiveness of drug checkpoints in general is constitutionally indistinguishable. *Sitz*, 496 U.S. at 453.

1. OBJECTIVELY, DRUG ROADBLOCKS INTERFERE ONLY MINIMALLY WITH INDIVIDUAL LIBERTY.

It is conceded that any checkpoint stop will constitute a seizure as the stop "intrude[s] to a limited extent on motorists' right to 'free passage without interruption.'" *Martinez-Fuerte*, 428 U.S. at 556, 557-58 (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)); *Sitz*, 496 U.S. at 450. However, this Court has historically refused to draw a bright line on the length of an investigative stop, relying rather on the directive that the seizure "not involve any delay unnecessary to the legitimate investigation of the law enforcement officers." *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985).

In *Martinez-Fuerte* and *Sitz* the Court found the respective detentions to be both brief and minimal. 428 U.S. at 544-48, 558 (3 to 5 minute detention); 496 U.S. at 448, 452 (25 second average delay). More specifically, the Court in *Sitz* found:

> "virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officer might ask."

Id. at 451-52.

This determination is equally applicable to the matter now before the Court. Absent specific questions by law enforcement officers to the motorist about the possible possession of narcotics, the minimal level of intrusion is virtually identical to *Martinez-Fuerte* and *Sitz*.[18]

Any given checkpoint will involve a number of variables, e.g., increased traffic, weather, substantial "hit rates" resulting in increased investigation, etc. Thus, a checkpoint, at its inception, must be designed to limit any potential delays that motorists might encounter, such delays having the greatest potential for constitutional violations and liability. *Merrett*, 58 F.3d at 1552. The level of intrusiveness can be easily calculated through effective planning and the establishment of rigid guidelines designed not only to limit the discretion of the officers involved but also to counter any unforseen problems. Accordingly, organizational planning becomes paramount in order to limit the objective intrusion upon those passing through the checkpoint. *Martinez-Fuerte*, 428 U.S. at 559.[19]

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[18] For example, in *Damask*, the objective intrusion at both checkpoints was viewed as minimal. At the Franklin County checkpoint the officers were limited to checking a driver's license and registration, inquiring whether the driver saw the posted checkpoint signs, and why the driver had exited the road after seeing the sign. The Texas County checkpoint was even less intrusive. There officers did not check licenses and registrations, opting only to question the driver about whether they had observed the checkpoint sign, where they were going, and where they were coming from. In addition, the checkpoints were established in regions that fully minimized potential traffic problems. In all, a motorist was stopped, on the average, for no more than two minutes. 936 S.W.2d at 574.

[19] In his dissent, Judge Easterbrook rightfully noted that Indianapolis took great pains to establish a rigorous protocol for its checkpoint, thus eliminating the unconstrained discretion that was at the heart of this Court's decision in *Delaware v. Prouse*. *Edmond*, 183 F.3d at 670.

It is undisputed that checkpoint stops could fail a constitutional evaluation if they are operated at a level of indiscretion akin to a roving patrol. *Id.* at 558-59. As a result, narcotics checkpoints must be implemented in a manner so that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown*, 443 U.S. at 51 (citations omitted). Prior case law supports the fact that narcotics roadblocks are indeed established in a manner consistent with these well-settled constitutional principles, as common protocols include, among other things, advance planning, monitoring the time involved in the stop, and responding to potential traffic congestion. *See State v. Damask*, 936 S.W.2d 565, 574 (Mo. 1996); *Merrett*, 58 F.3d at 1549, 1551-52; *State v. Jackson*, 942 P.2d 640, 641-42, 24 Kan. App. 2d 38, 39-40 (1997).

2. SUBJECTIVELY, DRUG ROADBLOCKS INTERFERE ONLY MINIMALLY WITH INDIVIDUAL LIBERTY.

This Court has continually found the level of intrusiveness at checkpoints to be far less than that attending a roving patrol. *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975); *Martinez-Fuerte*, 428 U.S. at 558. Consequently, checkpoints are viewed in a wholly separate context. *Id.*

Courts must account for not only the level of discretion afforded the officers[20] but the potential for fear and surprise

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[20] In *Damask*, the appeals court went to the extent of asking the following: (1) Was the checkpoint conducted according to a plan prepared in advance with the input of both field and supervisory personnel? (2) Does the plan designate specific guidelines to be followed by field personnel? (3) Were the terms of the plan adequately disseminated to the field personnel prior to operation of the checkpoint? (4) Were supervisory personnel on hand to oversee the checkpoint? (5) Was the checkpoint location chosen by supervisory personnel for some nonarbitrary reason? (6) Were all vehicles stopped or, if not, were there specific, nondiscretionary criteria used to

generated by the checkpoint when evaluating the subjective intrusion on motorists. *Sitz*, 496 U.S. at 452. However, the "'fear and surprise' to be considered are not the natural fear of one who [is smuggling narcotics] over the prospect of being stopped at a [narcotics checkpoint] but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Id.* This fear, as this Court has found, is minimized by the fact that other vehicles are subjected to the same investigatory measures, that the authority of the law enforcement officers is visibly apparent, and that the fright and annoyance of such an intrusion is much less appreciable than that which might occur during a roving patrol stop. *Ortiz*, 422 U.S. at 894-95.

In light of these factors, the planning stage for a narcotics checkpoint becomes important as it is here that the level of discretion is defined. Guarding against the possibility of unbridled decision making, the field personnel's discretion must be sufficiently circumscribed in order to prevent the operational phase from shifting into a "roving patrol." Thus, a well-documented approach that narrows the discretion of the officers fulfills the constitutional safeguards. Additionally, an advance plan that is authorized by supervisory officers who establish a checkpoint in an area designed to accomplish the intended goal will further sustain the checkpoint's constitutionality. *Martinez-Fuerte*, 428 U.S. at 559.

Minimizing the fear of lawful travelers requires paying a great deal of attention to the actual set up of the narcotics checkpoint. Diminishing citizens' fears will therefore depend largely upon the notice that is supplied and the "visible signs of the officers' authority." *Ortiz*, 422 U.S. at 895. In most, if not all, circumstances motorists will be notified by one or more

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generate a random determination as to which vehicles would be stopped, as opposed to some sort of discretionary selection method? 936 S.W.2d at 574.

large signs signaling the approach of a narcotics checkpoint.[21] *Damask*, 936 S.W.2d at 568 (two signs reading "DRUG ENFORCEMENT CHECKPOINT 1 MILE AHEAD); *Merrett*, 58 F.3d at 1549 ("cones, warning signs, and flashing lights"); *State v. Everson*, 474 N.W.2d 695, 696 (N.D. 1991) (Large sign reading "Please stop"); *Edmond*, 183 F.3d 659 (See Pet. App. at 57a) ("NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP"); *United States v. Ramirez-Gonzalez*, 87 F.3d 712, 713 (5th Cir. 1996) (Large traffic signs posted over 100 yards away which read "Drug Interdiction Checkpoint."); *Jackson*, 942 P.2d at 642, 24 Kan. App. 2d at 39 (Motorists on I-35 advised by five signs stating either "check lane ahead" or "narcotics check lane ahead"). Once the checkpoint is reached, uniformed officers are present to conduct a routine inquiry with the traveler. *Damask*, 936 S.W.2d at 568 (cars found uniformed officer waiting); *Merrett*, 58 F.3d at 1549 (12 officers plus four to five K-9 units present at each checkpoint); *Everson*, 474 N.W. 2d at 696-697 (sheriff's deputies, drug enforcement officers and highway patrol officers present at checkpoint); *Edmond*, 183 F.3d 659 (See Pet. App. at 57a) (stopped cars met by a team of officers, one of whom was in full uniform); *Jackson*, 942 P.2d at 642, 24 Kan. App. 2d at 39 (17 officers at scene). It is clearly evident that having non-uniformed officers conducting the initial contact with the motorists could cause a potential hazard given the lack of apparent authority. It stands to reason that highly visible, uniformed officers will always be present during the primary encounter with a motorist.

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[21] In a very recent decision, the Fourth Circuit found that in a narcotics checkpoint established on Interstate 95 near Ridgeland, South Carolina, motorists were warned of an impending roadblock by "two signs, illuminated by safety flares and reflective lettering, reading 'DRUG CHECKPOINT AHEAD.'" *United States v. Brugal*, No. 98-4255, 2000 WL 345778, at *1 (4th Cir. Apr. 4, 2000).

In practical terms, a narcotics checkpoint is designed not only to minimize the fear that might be instilled in an approaching driver, but to ensure the safety of the officers as well. Towards that end, it seems only prudent that sufficient measures, through the use of large signs, direction cones, and necessary lighting, among other things, will be taken in order to balance the motorists interests with that of law enforcement.

The intrusion visited upon a motorist who is subject to a narcotics checkpoint is minor at most. A well-designed checkpoint will address any potential risks that might otherwise make the seizure unreasonable, thus limiting the interference with individual liberty. *Brown*, 443 U.S. at 51. There is no significant difference between narcotics checkpoints in general and the checkpoints approved in both *Martinez-Fuerte* and *Sitz*. All are similar in design and purpose, varying only in the criminal activity they seek to uncover. Accordingly, drug roadblocks satisfy the final *Brown* factor.

III. THE CONSTITUTIONALITY OF A ROADBLOCK MUST BE ASSESSED UNDER A REASONABLENESS STANDARD AND NOT ON THE EXISTENCE OF EXCEPTIONS.

The majority in *Edmond* ostensibly carves out an exception for roadblocks established by the federal government on an enumerated powers basis. Indeed, the majority acknowledged the "paradoxical implication" of that decision which, rightfully so, would contravene traditional notions of federalism by subjecting the states to greater Fourth Amendment restrictions. *Edmond*, 183 F.3d at 664-65. Evaluation of the constitutionality of a checkpoint must occur under the proper reasonableness analysis; it is *not* dependent on whether an exception exists for a particular federal agency. The Seventh Circuit's majority approach "to normal fourth amendment principles turns that amendment on its head." *Id.* at 670. (Easterbrook, J., dissenting). Any idea that a checkpoint's validity must be predicated on an exception

simply has no constitutional foundation and impinges the states' police powers.

Thus, this Court has found that "for purposes of Fourth Amendment analysis, the choice among such reasonable [law enforcement] alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz*, 496 U.S. at 453-54. Judge Easterbrook's well-reasoned dissenting opinion in *Edmond* is consistent not only with *Sitz*, but with the framers' intent as well, given that "[l]ocal governments should have more, not less, leeway than does the national government to decide how the tradeoff between privacy and effective law enforcement shall be handled." *Edmond*, 183 F.3d at 671 (Easterbrook, J. dissenting).

The unprecedented mobility of today's populace means that politically accountable officials whose law enforcement methods prove ineffective and/or Draconian face the undesirable prospect of being removed at the ballot box and/or losing disgruntled citizens to neighboring communities with more responsive officials. The roadblocks at issue here are precisely the kind of reasonable law enforcement tools that politically accountable officials should be permitted to implement. The success or failure of these roadblocks will ultimately be judged by the citizenry, who will either reward those public officials with reelection or punish them by electing an opponent or relocating to another community.

IV. THIS COURT SHOULD NOT DEPART FROM ITS WELL-ESTABLISHED CASE LAW.

Balancing the state's interests against the individual liberty of a motorist in a fixed checkpoint context, this Court has, on several occasions, approved checkpoints. Indeed, in *Martinez-Fuerte*, *Sitz*, *Prouse*, and *Brown*, this Court has approved the establishment of checkpoints that are minimally intrusive and

sufficiently limit the discretion of individual officers. In the final analysis, narcotics roadblocks are constitutionally permissible. The strictures of the Fourth Amendment are not violated because the "balance of the State's interest in [eradicating narcotics trafficking], the extent to which [these checkpoints] can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state . . . ." *Sitz*, 496 U.S. at 455.

CONCLUSION

For the foregoing reasons, this Court should reverse the Seventh Circuit's decision.

Respectfully submitted,

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(Counsel of Record)
JARED S. MAAG
Assistant Attorney General
120 S.W. 10th Avenue, 2nd Fl.
Topeka, Kansas 66612-1597
(786) 296-2215

Counsel for Kansas and the Amici States

May 2000

BILL PRYOR
Attorney General
State of Alabama

JANET NAPOLITANO
Attorney General
State of Arizona

MARK PRYOR
Attorney General
State of Arkansas

BILL LOCKYER
Attorney General
State of California

JOHN M. BAILEY
Chief State's Attorney
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

JAMES E. RYAN
Attorney General
State of Illinois

KAREN M. FREEMAN-WILSON
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

MICHAEL C. MOORE
Attorney General
State of Mississippi

DON STENBERG
Attorney General
State of Nebraska

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

JAN GRAHAM
Attorney General
State of Utah

MARK L. EARLEY
Attorney General
State of Virginia

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

No. 99-1030

IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND STEPHEN GOLDSMITH, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS,

Petitioners,

v.

JAMES EDMOND, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals For the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a "narcotics detection" dog around the exterior of each stopped automobile are unlawful under the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a strong interest in legal issues that affect state and local governments.[1]

As Justice Powell wrote, "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring). The drug trade destroys lives and families, causes crime, ruins neighborhoods, disrupts schools, strains the health care systems of urban areas, and harms business, industry and workplaces. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Drugs, Crime, and the Justice System* 7-14 (1992).

The pervasiveness and extent of the harms caused by drug trafficking mandate innovative approaches to law enforcement efforts. Like other States and local governments, Indianapolis has initiated a highly effective program of drug checkpoints, which is modeled on the programs upheld by this Court in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The program is conducted under strict guidelines which constrain police discretion and involves only a brief delay to motorists. The sole difference between Indianapolis'

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

program and those which the Court has previously upheld is that each car is subject to a non-invasive dog sniff. *See United States v. Place*, 462 U.S. 696, 707 (1983). This, however, does not render the program a violation of the Fourth Amendment's prohibition against unreasonable seizures.

Acknowledging that under existing Fourth Amendment doctrine "these roadblocks probably are legal," Pet. App. 3a, the court of appeals devised a novel rule to invalidate the program. According to the court, "the purpose behind the *program* is critical to its legality" and "[t]he program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." *Id.* at 10a. This rule is inconsistent with the text of the Fourth Amendment and this Court's cases, which use an objective inquiry to assess the reasonableness of police procedures. It threatens other constitutionally reasonable police procedures whenever they are used primarily for general criminal law enforcement.

Because of the importance of the issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

A police roadblock is a seizure under the Fourth Amendment, but the Fourth Amendment prohibits only those seizures that are unreasonable. The constitutionality of a roadblock is thus determined by "weighing . . . the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Applying this test, the Court has twice upheld roadblocks. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Indianapolis' program is likewise constitutional. The distribution, sale and use of illegal drugs is one of this country's most pressing problems. The roadblocks clearly advance the public interest as the program has resulted in an arrest rate of 4.7 percent for drug offenses and 4.3 percent for driving offenses.

Nor does the program unreasonably interfere with individual liberty. The roadblocks are carried out under a plan which imposes "explicit, neutral limitations on the conduct of individual officers," *Brown v. Texas*, 443 U.S. at 51, and does not permit deviation from the procedure absent additional justification. Moreover, the location of the roadblocks is selected weeks in advance by officers at the supervisory level.

The level of objective intrusion is only marginally greater than that of sobriety checkpoints, which the *Sitz* Court characterized as "minimal." 496 U.S. at 452. The average duration of a stop is two to three minutes or less, Pet. App. 28a, 57a, a shorter period than that upheld in *Martinez-Fuerte*. *See* 428 U.S. at 547. The only significant difference between Indianapolis' program and those upheld in *Martinez-Fuerte* and *Sitz* is the dog sniff. A dog sniff, however, is a limited noninvasive procedure that does not require a driver to open car doors, the glove compartment, or the trunk. "It does not expose noncontraband items that otherwise would remain hidden from public view" and "discloses only the presence or absence of narcotics, a contraband item." *United States v. Place*, 462 U.S. 696, 707 (1983). There is "no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* Indeed, the Court has held that a dog sniff is not "a 'search' within the meaning of the Fourth Amendment." *Id.* The objective intrusion of Indianapolis' roadblocks is thus well within the range of constitutional reasonableness.

The subjective intrusion of Indianapolis' program – "the fear and surprise engendered in law-abiding motorists by the nature of the stop," *Sitz*, 496 U.S. at 452 – does not render it constitutionally unreasonable. Motorists are provided with " 'visible signs of the officers' authority,'" *id.* at 453 (quoting *Martinez-Fuerte*, 428 U.S. at 558) including signs announcing the checkpoint and the presence of thirty police officers and several cruisers. Motorists can also see that the procedure is conducted in a regularized manner. Finally, having a dog led around the exterior of one's car does not create fear and anxiety in a "law-abiding motorist[]," *id.* at 452, to any greater degree than police walking around the car to check for working lights, a valid license plate, and inspection sticker. It is also far less likely to generate fear and anxiety than the selective referrals for further questioning, even in the absence of articulable suspicion, which the Court upheld in *Martinez-Fuerte*. *See* 428 U.S. at 560.

The court of appeals acknowledged that if the reasonableness of Indianapolis' program "is to be assessed at the level of the entire program . . . these roadblocks probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops." Pet. App. 3a. The court failed, however, to follow this Court's precedents, reasoning instead that "courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders." *Id.* at 4a. Because Indianapolis acknowledged that the primary purpose of its roadblocks was to interdict drug offenders, the court held the program unconstitutional.

The court of appeals' contention that courts do not assess the reasonableness of police procedures related to general criminal law enforcement by conducting program-level balancing cannot be squared with cases such as *Martinez-Fuerte*

and *Sitz*, which employed this approach. It ignores that in *Martinez-Fuerte*, each of the non-governmental parties had been indicted for multiple felony offenses. And while *Sitz* did not arise out of a criminal prosecution, the Court was surely cognizant of the consequence for those found at a roadblock to have been driving under the influence. It also ignores other cases in which this Court has relied on programmatic justifications to uphold police procedures related to general criminal law enforcement. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968).

This Court's cases also refute the court of appeals' contention that inquiry into a program's purpose "is critical to its legality," and because Indianapolis' "program has no regulatory purpose," it is constitutionally unreasonable. Pet. App. 10a. Aside from the fact that the district court found that Indianapolis' program had the secondary purpose of checking driver's licenses and vehicle registrations, this Court has "never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 812 (1996). Furthermore, in *Sitz* the Court expressly rejected the contention that "there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate." 496 U.S. at 450. That the government's purpose is to enforce the criminal law as opposed to a regulatory program is not probative of whether police conduct that does not amount to a search is constitutionally reasonable.

The court of appeals' inquiry into purpose is also unworkable, as shown by the court's suggestion that the result might be different "if the primary purpose were to detect drunken drivers" because "the dog could be added to the roadblock scenario on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible." Pet.

App. 11a. Rather than engage in an inquiry which the Fourth Amendment provides no standard for resolving, courts should examine the intrusiveness of the procedures used at a roadblock to determine whether the interference with individual liberty is so severe as to render it constitutionally unreasonable. Because Indianapolis' procedures do not unreasonably intrude on motorists' liberty, the program is constitutional.

ARGUMENT

INDIANAPOLIS' ROADBLOCK PROGRAM SATISFIES THE FOURTH AMENDMENT

The court of appeals failed to follow settled Fourth Amendment principles in striking down Indianapolis' highly effective roadblock program. The court acknowledged that "[i]n the case of Indianapolis' drug-roadblock program, the probability of a 'hit' is high," that "the deterrence of drug offenses produced by these hits advances the strong national, state, and local policy of discouraging the illegal use of controlled substances," and that "[t]he cost—in delay, anxiety, and invasion of privacy—to the drivers and passengers stopped for five minutes at a roadblock and subjected to a visual inspection of the interior and a sniff by a dog is small," Pet. App. 4a, thus demonstrating that the program satisfies the three-part test of *Brown v. Texas*, 443 U.S. 47 (1979).[2]

Viewing the program as a "method[] of policing associated with totalitarian nations," Pet. App. 4a-5a, the court of appeals failed to apply the *Brown* test. It did so notwithstanding that *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), applied this test in upholding sobriety checkpoints for drivers "under the influence of alcohol or controlled substances." Brief for Petitioners at 6, *Sitz* (No. 88-1897); *see*

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[2] Indeed, the cost to motorists is even less than this, as the district court found that "[a] typical stop lasts 2 to 3 minutes." Pet. App. 28a (citing Depew Aff. ¶ 5, Pet. App. 57a-58a).

also Pet. App. 7a (*Sitz* upheld "roadblocks at which drivers are checked for being under the influence of alcohol or (other) mind-altering drugs"). According to the court of appeals, "the purpose behind the *program* is critical to its legality." *Id.* at 10a. In the court's view, because the City's program "is meant to intercept a completely random sample of drivers [and] there is neither probable cause nor articulable suspicion to stop *any* given driver," *id.* at 6a, it is constitutionally unreasonable unless it is "a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." *Id.* at 10a. Because the city openly acknowledged that the program's primary purpose is "to interdict unlawful drugs," *id.* at 51a (stipulation), the court held that Indianapolis' roadblocks violate the Fourth Amendment.

As explained below, the court of appeals' rule is unhelpful in determining whether Indianapolis' roadblocks are reasonable under the Fourth Amendment. While "inquiry into purpose is one method of identifying and banning the most flagrantly abusive governmental conduct," Pet. App. 11a, interdicting drug offenders is as indisputably valid and compelling a governmental purpose as "detect[ing] drunk drivers." Pet. App. 10a-11a; *see United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring). Moreover, the *Brown v. Texas* standard identifies "the most flagrantly abusive governmental conduct," Pet. App. 11a, because it examines "the degree to which the seizure advances the public interest." 443 U.S. at 51. Indianapolis' roadblocks are only minimally more intrusive to motorists than the roadblocks upheld in *Sitz* and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The incremental intrusion of a dog sniff – which itself is not a search, *see United States v. Place*, 462 U.S. 696 (1983) – does not render Indianapolis' roadblocks constitutionally unreasonable. While law enforcement experts might disagree over the best methods for interdicting drug offenders, the Court has made clear that the Fourth Amendment leaves it to

politically accountable state and local officials to choose among constitutionally reasonable alternatives. *See Sitz*, 496 U.S. at 453-54.

A. *Brown v. Texas* Provides The Standard For Determining The Constitutionality Of Indianapolis' Checkpoints

It is well settled that police roadblocks or " 'checkpoint stops are 'seizures' within the meaning of the Fourth Amendment.'" *Sitz*, 496 U.S. at 450 (quoting *Martinez-Fuerte*, 428 U.S. at 556). The Fourth Amendment, however, does not prohibit all seizures but only those which are unreasonable. *See id.; see also United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). "The reasonableness of seizures that are less intrusive than a traditional arrest depends " ' "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ' " *Brown v. Texas*, 443 U.S. at 50 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *Brignoni-Ponce*, 422 U.S. at 878)). The Court has further explained that "[c]onsideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 50-51.

The essential concern in assessing the reasonableness of a seizure short of arrest is to protect "the individual's right to personal security free from arbitrary interference by law officers." *Brignoni-Ponce*, 422 U.S. at 878. *See Sitz*, 496 U.S. at 450; *Brown*, 443 U.S. at 51. "[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of a particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51. Thus, while the Court has held that random

stops of motorists which are not based on individualized suspicion are constitutionally unreasonable, *see Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *Brignoni-Ponce*, 422 U.S. at 882-84, it has twice upheld roadblocks conducted by officers whose discretion has been properly circumscribed to protect against arbitrary police conduct. *See Sitz*, 496 U.S. at 450-53; *Martinez-Fuerte*, 428 U.S. at 559-64.

1. In *Martinez-Fuerte*, the Court held that the Border Patrol's operation of fixed roadblocks to detect illegal aliens, which were established on major highways in Southern California and Texas 65 to 90 miles from the Mexican border, were reasonable under the Fourth Amendment notwithstanding that the government did not have reasonable suspicion to stop any single vehicle. *See* 428 U.S. at 545-50.[3] The Court began its Fourth Amendment analysis by noting "the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints," and that "[r]outine checkpoint inquiries apprehend many smugglers and illegal aliens who" use "important highways" as "a quick and safe route into the interior." *Id.* at 556-57. The Court thus concluded that the government's "need to make routine checkpoint stops is great." *Id.* at 557.

The Court then examined the degree to which the stops intruded on Fourth Amendment interests. The Court observed that the proceedure "involves only a brief detention of travelers during which all that is required of the vehicle's occupants

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[3] Although the court of appeals distinguished *Martinez-Fuerte* on the ground that it "depend[ed] ultimately on sovereign powers over foreign relations, foreign commerce, citizenship, and immigration that states and cities do not possess," Pet. App. 9a (citation omitted), the *Sitz* Court extensively relied on *Martinez-Fuerte* in upholding Michigan's sobriety checkpoints. *See, e.g.*, 496 U.S. at 450 ("*Martinez-Fuerte*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas*, are the relevant authorities here.") (citations omitted).

is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Id.* at 558 (internal quotations and citation omitted). Furthermore, "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." *Id.* While noting that "[t]his objective intrusion" also existed with the roving patrol stops which the Court held unconstitutional in *Brignoni-Ponce*, the Court explained that "we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." *Id.* This is so, the Court reasoned, because " '[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'" *Id.* (quoting *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975)).

The *Martinez-Fuerte* Court also found it significant that "checkpoint operations both appear to and actually involve less discretionary enforcement activity." *Id.* at 559. As the Court explained, "[t]he regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest." *Id.* The Court noted with approval that "[t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources," who are "unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *Id.* Because "field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." *Id.*

Adhering to these principles, the Court in *Delaware v. Prouse* held unconstitutional random spot checks of a driver's license and vehicle registration which are not based on "at least articulable and reasonable suspicion." 440 U.S. at 663. In particular, the Court noted that "[f]or Fourth Amendment purposes, we . . . see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community." *Id.* at 657.

Moreover, absent some degree of individualized suspicion, the Court could not "conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver." *Id.* at 661. It is "[t]his kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.* Thus, while the Court held unconstitutional the spot check at issue in *Prouse*, it explained that "[t]his holding does not preclude the . . . States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663.[4]

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[4] In a concurring opinion, Justice Blackmun, joined by Justice Powell, likewise endorsed "the roadblock stop for all traffic" as an example of "less intrusive spot checks 'that do not involve the unconstrained exercise of discretion.' " 440 U.S. at 663-64 (quoting *id.* at 663). Justice Blackmun further expressed the view that "other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop" are constitutionally reasonable. *Id.* at 464.

In *Sitz*, the Court upheld Michigan's sobriety checkpoints. The *Sitz* Court began by rejecting the motorists' argument – adopted by the court of appeals in this case – that application of the *Brown* balancing test was improper absent "a showing of some special governmental need 'beyond the normal need' for criminal law enforcement.'" 496 U.S. at 450 (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989)). *Von Raab*, the Court explained, did not "repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas*, are the relevant authorities here."[5] 496 U.S. at 450 (citations omitted).

Turning to the balancing test, the Court observed that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Id.* at 451. As for the interference with motorists' Fourth Amendment interests, the Court characterized the objective intrusion as "slight," adding that "[w]e see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask." *Id.*

The Court next rejected the Michigan court's conclusion that the subjective intrusion on motorists was substantial because the checkpoints had "the potential to generate fear and surprise in motorists." *Id.* at 452. The Court explained that "[t]he 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being

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[5] *Sitz*'s reliance on *Martinez-Fuerte* demonstrates the erroneousness of the court of appeals' view, *see* Pet. App. 9a, that the Fourth Amendment imposes greater restrictions on state than federal officials in conducting roadblocks.

stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Id.* Noting that the "checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle," the Court concluded that "[t]he intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*." *Id.* at 453.

Finally, the Court addressed "'the degree to which the seizure advances the public interest.'" *Id.* (quoting *Brown*, 443 U.S. at 51). In this regard, the Court explained that "[t]his passage . . . was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Id.* While "[e]xperts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal," the Fourth Amendment leaves "the choice among such reasonable alternatives [to] the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id.* at 453-54. Noting that "the record from one of the consolidated cases in *Martinez-Fuerte* showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint," and that "[t]he ratio of illegal aliens detected to vehicles stopped . . . was approximately 0.5 percent," the Court concluded that the Michigan checkpoint's arrest rate of 1.6 percent demonstrated the effectiveness of the program. *Id.* at 455.

2. Applying the principles of these cases, it is clear that Indianapolis' drug roadblock program satisfies the Fourth Amendment. The distribution, sale, and use of illegal drugs remains one of this country's most pressing problems. "The public has a compelling interest in detecting those who would

traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *United States v. Mendenhall*, 446 U.S. at 561 (Powell, J., concurring). Indianapolis is not immune from the harms caused by drug trafficking and drug abuse.[6] "[T]he magnitude" of the problem and the City's "interest in eradicating it" are uncontestable. *Sitz*, 496 U.S. at 451.

Nor can there be any dispute as to whether the drug roadblocks sufficiently "advance[] the public interest." *Sitz*, 496 U.S. at 453. Indianapolis conducted six roadblocks at which 1,161 cars were stopped. *See* Pet. App. 2a, 55a. These stops yielded 55 arrests for drug offenses, 49 arrests/citations for driving offenses, and 5 arrests for other offenses. *See id.* As a percentage of the vehicles stopped, the roadblocks resulted in arrests and citations at a rate of 4.7 percent for drug offenses and 4.2 percent for driving offenses. These results demonstrate that Indianapolis' program was substantially more effective than those which the Court upheld in *Sitz* and *Martinez-Fuerte*. *See Sitz*, 496 U.S. at 454-55 (1.6 % arrest rate for drunk driving demonstrated that roadblock advanced State's interest); *Martinez-Fuerte*, 428 U.S. at 554 (0.12 % arrest rate).

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[6] According to U.S. DEA statistics, 66.8 percent of adult males arrested in Indianapolis test positive for drug use in 1998. Since 1993, no less than 60 percent of adult males arrested in Indianapolis have tested positive for drug use. *See* U.S. Department of Justice, Drug Enforcement Administration, Table, *Percentage of Adult Males Testing Positive for Any Drug at Time of Arrest* (visited May 12, 2000) <http://www.usdoj.gov/dea/stats/drugstats.htm>. In 1998, 34.2 percent of Indianapolis' arrestees tested positive for cocaine, 45.1 percent tested positive for marijuana, and 1.8 tested positive for opiates. *See* Table, *Percentage of Adult Males Testing Positive for Specific Drugs at Time of Arrest in 1998* (visited May 12, 2000) <http://www.usdoj.gov/dea/stats/drugstats.htm>.

Nor does Indianapolis' program unreasonably "interfere[] with individual liberty." *Brown v. Texas*, 443 U.S. at 51. The roadblocks were "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* Roadblock locations "are selected at the supervisorial level weeks in advance based on geographic suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which will minimize the interference with normal traffic flow" while "permit[ting] observation of traffic approaching the checkpoint." Pet. App. 56a (affidavit of Sergeant Depew).

Moreover, "[t]he checkpoints are begun with [a] predetermined number of cars being stopped" and each "vehicle is processed in exactly the same fashion as all other vehicles," *id.* at 57a, with all drivers being asked to present their license and registration while a drug detection dog walks around the car. *See id.* at 54a, 57a. The next group of cars is not stopped until the last stopped car has been processed and allowed to depart. *See id.* at 57a. "[N]o deviations from" the car selection procedure are "permitted and under no circumstances are random stops permitted or utilized." *Id.* Further investigation is impermissible absent additional justification such as a driver's failure to present a valid license, plain view observation of contraband or a weapon, or a dog alert, which establishes probable cause. *See* Pet. App. 53a-54a. Indianapolis' procedure thus circumscribes the discretion of field officers to an even greater extent than the procedure upheld in *Martinez-Fuerte*, which allowed for the selective referral of motorists "to the secondary inspection area . . . on the basis of criteria that would not sustain a roving-patrol stop." 428 U.S. at 563.

Furthermore, Indianapolis' roadblocks do not unreasonably intrude on motorists' Fourth Amendment interests. The degree of " 'objective intrusion'" – as "measured by the duration of the seizure and the intensity of the investigation" – is only marginally greater than that of sobriety checkpoints,

which the *Sitz* Court characterized "as minimal." 496 U.S. at 452 (citation omitted). If a motorist presents a valid license and registration "and there is no probable cause presented by the officer's plain-view, plain smell[] examination, or a dog alert," the motorist is allowed to proceed. Pet. App. 57a. The average duration of such a stop is two to three minutes or less,[7] *see id.* at 28a, 57a, a period of shorter duration than that upheld by the Court in *Martinez-Fuerte*. *See* 428 U.S. at 547.

The only significant difference in the level of "objective intrusion" between Indianapolis' program and those approved in *Sitz* and *Martinez-Fuerte* is the dog sniff. But the incremental intrusion of a dog sniff conducted on a public street, where the dog's presence is lawful, is too insubstantial to render Indianapolis' program constitutionally unreasonable. A sniff "by a well-trained narcotics detection dog" of the exterior of a car is a non-invasive procedure as it does not require a driver to open car doors, the glove compartment or the trunk. *See United States v. Place*, 462 U.S. 696, 707 (1983). "It does not expose noncontraband items that otherwise would remain hidden from public view" and "discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of [a car], the information obtained is limited." *Id.* Indeed, there is "no other investigative pro-

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[7] When a motorist fails to present a valid license and registration, the police run a records check utilizing the on-scene mobile data terminal, which "may take an additional 15 seconds to two minutes." Pet. App. 58a; *see also id.* at 52a. A driver's failure to carry a license and registration is more than adequate justification to conduct further investigation. *See Prouse*, 440 U.S. at 658 ("[T]he States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed."). *See also, e.g.*, Ind. Ann. Code §§ 9-24-1-1 (requiring licenses); 9-24-18-5 (prohibiting driving while license is suspended or revoked).

cedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* In short, a sniff is not "a 'search' within the meaning of the Fourth Amendment." *Id.* The intrusion is no greater than that which is constitutionally permissible at either a sobriety or immigration checkpoint.[8]

Likewise, the " 'subjective' intrusion" of Indianapolis' checkpoints – "the fear and surprise engendered in law-abiding motorists by the nature of the stop," *Sitz*, 496 U.S. at 452 (citation omitted) – does not render the program constitutionally unreasonable. Motorists are provided with "visible signs of the officers' authority," *id.* at 453 (citations omitted), including lighted signs which identify the checkpoints as a "NARCOTICS CHECKPOINT __ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP," Pet. App. 57a, the presence of "approximately thirty" police officers including uniformed patrolmen, and police cruisers. *Id.* at 52a. Furthermore, motorists can see that the procedure is conducted in a regularized manner, with all cars receiving the same initial processing. *See Sitz*, 496 U.S. at 453. Finally, having a dog led around the exterior of one's car does not create fear and anxiety in a "law-abiding motorist[]," *id.* at 452, to any greater degree than police walking around the car

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[8] In 1994-95, the State of Tennessee, with the assistance of a National Highway Traffic Safety Administration grant, conducted an extensive statewide sobriety checkpoint program, in which officers "used passive alcohol sensors in flashlights to detect the odor of alcoholic beverages." *See* U.S. DOT, NHTSA, Technical Report, Evaluation of *Checkpoint Tennessee:* Tennessee's Statewide Sobriety Checkpoint Program, Executive Summary at 4 < http://www.nhtsa.dot.gov/people/injury/research /ChekTenn/ChkptTN.html>. Such devices are functionally indistinguishable from drug detection dogs, in that they reveal only the presence or absence of alcohol odors in a driver's breath. An affirmance of the court of appeals' judgment would raise a serious question regarding the constitutionality of such non-invasive devices as passive alcohol detection sensors.

to check for working lights, a valid license plate and inspection sticker. And it far less likely to generate fear and anxiety in a law-abiding motorist then the selective referrals to a secondary inspection area for further questioning which the Court upheld in *Martinez-Fuerte*. *See* 428 U.S. at 560.

As the forgoing demonstrates, Indianapolis' program causes only an incremental interference with motorists' liberty, which is of insufficient magnitude to render it unconstitutional. The program's high degree of effectiveness demonstrates that it "advances the public interest," *Brown*, 443 U.S. at 51, and is thus constitutionally reasonable. Because the program satisfies the *Brown* standard, the court of appeals erred in invalidating it.

B. A Primary Purpose Of Interdicting Drug Offenders Does Not Render Indianapolis' Program Violative Of The Fourth Amendment

The court of appeals acknowledged that if the reasonableness of Indianapolis' program "is to be assessed at the level of the entire program . . . these roadblocks probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops." Pet. App. 3a. The court failed to follow controlling precedent, however, explaining that "courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders." *Id.* at 4a (citation omitted). According to the court, "[b]ecause it is infeasible to quantify the benefits and costs of most law enforcement programs, the program approach might well permit deep inroads into privacy." *Id.*

Evidently concluding that Indianapolis' program amounts to a "dragnet search" – a term which neither the court of appeals nor this Court have ever defined – the court further reasoned that "[a]lthough there is nothing in the text of the

Fourth Amendment to prevent dragnet searches . . . the Supreme Court has insisted that 'to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing,' save in cases of 'special need' based on 'concerns *other than crime detection*.'" *Id.* at 5a (quoting *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997) (emphasis added by court of appeals)). In the court of appeals' view, "[p]rogram-level justifications for searches in support of specific regulatory programs do not carry over to general criminal law enforcement." *Id.* Because Indianapolis acknowledged that the primary purpose of the roadblocks was to interdict drug offenders, the court held the program unconstitutional.

1. The court of appeals' reasoning finds scant support in this Court's Fourth Amendment jurisprudence. The court's first contention – that it is improper to assess the reasonableness of Indianapolis' roadblocks "at the program level" by a balancing analysis because courts do not do so "when they are dealing with searches related to general criminal law enforcement rather than to primarily civil regulatory programs," Pet. App. 4a – simply ignores numerous cases in which this Court has done precisely that, including the most relevant authority of *Martinez-Fuerte* and *Sitz*.[9]

In *Martinez-Fuerte*, each of the non-governmental parties was a person who had been indicted on multiple counts of

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[9] Implicit in the court of appeals' statement is the suggestion that Indianapolis' roadblock stops are searches for purposes of the Fourth Amendment. Both *Sitz* and *Martinez-Fuerte* characterized the initial stop and questioning as a "seizure." *See Sitz*, 496 U.S. 450-51; *Martinez-Fuerte*, 428 U.S. at 556. Moreover, in *Place*, the Court held that a dog sniff is not "a 'search' within the meaning of the Fourth Amendment" because it is "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." 462 U.S. at 707. To the extent the court of appeals analyzed Indianapolis' program as a search, it was mistaken.

illegally transporting aliens in violation of the former 8 U.S.C. § 1324(a)(2); several of the defendants had also been charged with other felony offenses. *See* 428 U.S. at 547-49. While *Sitz* did not involve the appeal of a criminal prosecution, the Court was obviously cognizant that the consequence for those found to have been "driving under the influence" was their arrest. *See* 496 U.S. at 448.

Notwithstanding the serious criminal consequences facing those apprehended in *Martinez-Fuerte* and *Sitz*, in both cases the Court analyzed the reasonableness of the police conduct at the program level by weighing, in the aggregate, the benefits to the public interest against the costs to the motoring public. In *Martinez-Fuerte*, the Court expressly noted that "[r]outine checkpoint inquiries apprehend many smugglers and illegal aliens," that the government's "need to make routine checkpoint stops is great," and that "[r]outine checkpoint stops do not intrude [unreasonably] on the motoring public." 428 U.S. at 557-58. In *Sitz*, the Court explicitly rejected the argument "that there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate." 496 U.S. at 450. The Court thereupon observed that " '[d]runk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage,'" and that "the weight bearing on the other scale – the measure of the intrusion on motorists stopped briefly at sobriety checkpoints – is slight." 496 U.S. at 451 (citation omitted).

While the court of appeals erroneously viewed the programs at issue in *Martinez-Fuerte* and *Sitz* as being "primarily civil regulatory programs," this Court's Fourth Amendment jurisprudence contains numerous cases relying on programmatic justifications to uphold police procedures "related to general criminal law enforcement." Pet. App. 4a. For example, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held

that a police officer has the authority to conduct a pat down search for weapons on less than probable cause. The Court relied on FBI statistics which detailed the number of police officers killed or wounded in the line of duty nationwide, noting that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Id.* at 23, 24 n.21.

The Court also acknowledged that "a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. In holding that a police officer could conduct a pat down search on the basis of an articulable reasonable suspicion, the Court did exactly what the court of appeals asserted that courts do not do – "assess reasonableness at the program level" of a search "related to general criminal law enforcement." Pet. App. 4a. *See also* 392 U.S. at 21 ("there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails'") (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

The Court took the same approach in *United States v. Robinson*, 414 U.S. 218 (1973), upholding a police officer's authority to conduct a search incident to arrest notwithstanding the absence of probable cause to believe the arrestee was carrying a weapon or evidence. The Court refused to limit "the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes." *Id.* at 234. In the Court's view, this assumption rested on "a rather speculative judgment," which was refuted by FBI statistical data "indicat[ing] that a significant percentage of murders of police officers occurs when the

officers are making traffic stops." *Id.* at 234 & n.5 (citations omitted). As the Court explained, "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." *Id.*

Recognizing the necessarily "*ad hoc* judgment" involved in a search incident to arrest, the Court held:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

Id. at 235. *See also Maryland v. Buie*, 494 U.S. 325, 332-34 (1990) (determining reasonableness of protective sweep of premises where arrest occurs by balancing governmental interest in police safety against arrestee's Fourth Amendment interests); *Place*, 462 U.S. at 703-04 (rejecting argument that "absent some special law enforcement interest such as officer safety, a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause"); *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981) (upholding detention of occupant of house being searched on less than probable cause, reasoning that "[a]lthough no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence").

As the foregoing demonstrates, the Court routinely analyzes the reasonableness of police procedures "related to gen-

eral criminal law enforcement" by conducting "program level" assessments and balancing. Pet. App. 4a. Contrary to the view of the court of appeals, this approach does not "permit deep inroads into privacy," *id.*, as numerous cases demonstrate. *See, e.g., Place*, 462 U.S. at 703-10 (conducting balancing but holding unreasonable a ninety-minute seizure of a suspect's luggage to arrange a drug sniff that was supported by a reasonable suspicion but not probable cause), *Brown v. Texas*, 443 U.S. at 50-53 (holding unreasonable a discretionary seizure to require a person to identify himself which was not supported by "a reasonable suspicion" of criminal activity).

2. The Court's cases likewise refute the court of appeals' contention that inquiry into the program's purpose "is critical to its legality," and because "[t]he program has no regulatory purpose," it is constitutionally unreasonable. Pet. App. 10a. The first flaw in this reasoning is that the district court found that "a secondary purpose of the checkpoints is to check driver's licenses and vehicle registrations." *Id.* at 44a. Indeed, out of the program's 109 arrests and citations, 49 were for driving-related offenses. *See id.* at 55a. The court of appeals was clearly mistaken in asserting that the program "has no regulatory purpose." *Id.* at 10a.[10]

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[10] Even if not intended, it is clear that the use of a drug-sniffing dog advances the substantial state interest in promoting highway safety. According to NHTSA, "[a]lcohol and other drugs create a serious highway safety problem among the general driving population." *See* U.S. Department of Transportation, National Highway Traffic Safety Administration, *Drug Impaired Driving* (visited May 11, 2000) <http://www.nhtsa.gov/people/outreach/safesobr/15qp/web/iddrug.html >. NHTSA "estimates that drugs are used by approximately 10 to 22 percent of drivers involved in crashes, often in combination with alcohol." *Id.* A 1992 NHTSA study of the deaths of 1,882 drivers indicated that "alcohol was found in 51.5 percent of the drivers, and other drugs were found in 17.8 percent of the drivers." *Id.* A NHTSA study of "non-fatally injured drivers" found that "12 percent of all drivers tested positive for drugs

The second flaw is that while some of the Court's cases suggest that inquiry into purpose is sometimes relevant in assessing the validity of certain intrusions, almost every case has involved police conduct amounting to a search. *See, e.g., New York v. Burger*, 482 U.S. 691, 713-16 (1987) (upholding warrantless inspections of closely regulated businesses); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (observing in dictum that "there is no suggestion" that an inventory search of a car "was a pretext concealing an investigatory police motive"). The Court has, however, "never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 812 (1996). In any event, there can be no claim of pretext here, where Indianapolis openly

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other than alcohol . . . and 23.5 percent of drivers less than 21 years old tested positive for drugs other than alcohol." *Id.* NHTSA further states that "[s]tudies of drug incidence among drivers arrested for motor vehicle offenses have found drugs in 15 to 50 percent of drivers. The higher rates typically are more prevalent among drivers who have been arrested for impaired or reckless driving but who were not impaired by alcohol, as shown by low blood alcohol concentration (BAC) levels." *Id.*

NHTSA also suggests a high degree of marijuana use by teenagers while driving. *Id.* According to NHTSA, twenty percent of high school seniors "reported that they smoke marijuana in a car." *Id.* This figure is greater than the percentage of students who acknowledge drinking alcoholic beverages in cars. *Id.* A recent Department of Justice survey which conducted personal interviews with DWI offenders indicates that 9.5 percent of jailed DWI offenders reported using drugs at the time of their arrest. U.S. Department of Justice, Bureau of Justice Statistics, *DWI Offenders under Correctional Supervision* 11 (Table 16) (1999).

Drug checkpoints are thus an important adjunct to alcohol sobriety checkpoints; indeed, the procedures upheld in *Sitz* checked for drivers who were under the influence of both alcohol and drugs. *See* Brief for Petitioners at 6, *Sitz; see also* Pet. App. 7a.

acknowledged that one of the purposes of the program was to conduct a "narcotics checkpoint." Pet. App. 57a.[11]

To the extent the court of appeals engaged in an objective inquiry into the City's purpose, the Court's cases support the view that a purpose of general criminal law enforcement does not preclude application of the *Brown* test in assessing the reasonableness of a seizure. In *Sitz*, the Court expressly rejected the contention that "there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate," and held that the *Brown* standard controlled. 496 U.S. at 450. *See also Florida v. Royer*, 460 U.S. 491, 498-99 (1983) (noting that in *Brignoni-Ponce* the government's purpose of enforcing immigration laws "was sufficient to warrant temporary detention for limited questioning" and declining to suggest "that a similar rationale would not warrant temporary detention for questioning on less than probable cause where the public interest involved is the suppression of illegal transactions in drugs or of any other serious crime"). That the government's purpose is to enforce the criminal law as opposed to a regulatory program is not probative as to whether

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[11] The court of appeals' reliance on dictum from the plurality opinion in *Texas v. Brown*, 460 U.S. 730 (1983), is misplaced. *See* Pet. App. 7a ("the amendment would be violated if 'the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in "plain view" in the course of a check for driver's licenses'") (quoting 460 U.S. at 743). The referenced language did not address the validity of the initial stop but rather whether the police properly seized evidence in plain view, the discovery of which was then required to be "inadvertent." At the time, a showing of pretext would have defeated a police claim that evidence had been discovered inadvertently. That requirement has since been overruled. *See Horton v. California*, 496 U.S. 128, 137-42 (1990). The objective inquiry established by *Horton* and *Whren* demonstrates that where the police have a constitutionally valid basis for a stop, it cannot be challenged as being pretextual.

police conduct that does not amount to a search is constitutionally reasonable.

3. This Court should reject the court of appeals' approach because it is unworkable and "injects too large an element of uncertainty into the interpretation" of the Fourth Amendment. Pet. App. 11a. Indeed, the court of appeals suggested that the result might be different "if the primary purpose were to detect drunken drivers" because "the dog could be added to the roadblock scenario on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible." *Id.* Just how a court would determine whether a roadblock program's primary purpose was detecting drunk drivers (or reducing traffic congestion) as opposed to catching drug offenders is unclear.[12] The Fourth Amendment does not answer the question, just as it says nothing that suggests why police practices which are undertaken for the purpose of enforcing the criminal law are more objectionable than those undertaken to enforce regulatory programs.

Contrary to the view of the court of appeals, "the alternative" is not "to rule that either all roadblocks are illegal or none are." *Id.* at 11a. Rather, consistent with *Brown*, *Martinez-Fuerte*, and *Sitz*, a court should examine the intrusiveness of the procedures used in conducting a roadblock to determine whether "the interference with individual liberty" is so severe as to render it constitutionally unreasonable. *Brown*, 443 U.S. at 51. Thus, a roadblock, at which police order –

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[12] *Compare United States v. McFayden*, 865 F.2d 1306, 1307-08 (D.C. Cir. 1989) (upholding checkpoint whose "principal purpose was to allow police to check for a driver's license and vehicle registration" even though it "facilitated a narcotics enforcement effort" and police testified "that they were hopeful that the roadblocks would also have a 'halo' or 'spin-off' effect of deterring drug trafficking"), *with Galbert v. United States*, 590 A.2d 990, 999 (D.C. 1991) (asserting that a roadblock "addressed to problems of general law enforcement . . . is antithetical to the Fourth Amendment").

without some articulable basis – every driver and passenger out of their car to conduct a more thorough plain view examination of a car's interior, might well be so intrusive as to render it unconstitutional. But where, as here, police discretion has been properly circumscribed, a roadblock that results in a brief delay to motorists and uses a non-intrusive measure that "discloses only the presence or absence of narcotics, a contraband item," *Place*, 462 U.S. at 707, is clearly within the range of constitutionally reasonable practices under the Fourth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

*Counsel of Record for the
Amici Curiae

May 15, 2000

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

No. 99-1030

In the Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, and STEPHEN GOLDSMITH, in His Official Capacity as Mayor of the City of Indianapolis, Indiana,
Petitioners,

v.

JAMES EDMOND, JOELL PALMER, on Their Own Behalf and on Behalf of a Class of Those Similarly Situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
Counsel of Record
JEFFREY S. BURK
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

May 15, 2000

2699

QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a "narcotics detection" dog around the exterior of each stopped automobile are unlawful under the Fourth Amendment.

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public-interest law and policy organization based in Washington, D.C., with supporters nationwide. WLF appears regularly in proceedings before federal and state courts to promote the rule of law, individual rights, free enterprise, and limited government. WLF has appeared before the Court as *amicus curiae* in other Fourth Amendment and particularly drug-related cases. *See, e.g., Chandler v. Miller,* 520 U.S. 305 (1997); *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995); *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444 (1990); *Treasury Employees v. Von Raab,* 489 U.S. 656 (1989).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared before the Court as *amicus curiae* on several occasions.

WLF submits this brief in support of petitioners and with the consent of the parties. Letters of consent have been filed with the clerk of the Court.[1]

SUMMARY OF ARGUMENT

The City of Indianapolis has determined, in its sovereign wisdom, that a portion of its law-enforcement resources should be devoted to apprehending narcotics traffickers within its jurisdiction. Consequently, the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel, made a monetary contribution to the preparation and submission of this brief.

city has established highway checkpoints that combine two clearly constitutional practices. It is indisputable that law-enforcement officers may briefly stop vehicular traffic to check motorists' licenses and vehicle registrations and to look for signs of impairment without violating the Fourth Amendment's prohibition on unreasonable seizures. It is also unquestionable that walking a "narcotics detection" dog around the exterior of a stopped automobile does not defy the Fourth Amendment's bar on unreasonable searches. In fact, the use of a dog's sense of smell does not constitute a search at all under the Fourth Amendment.

Nonetheless, the U.S. Court of Appeals for the Seventh Circuit ruled that when these two otherwise lawful activities are combined, they somehow become unconstitutional. In the Seventh Circuit's surprising conclusion, two rights make a wrong. The basis for the Seventh Circuit's opinion is that because the city's primary purpose is law enforcement rather than civil regulation, the checkpoints must be justified by individualized suspicion rather than weighing their benefits to society against their costs to individual privacy. This distinction permitted the Seventh Circuit to sidestep the Court's two most prominent checkpoint cases, *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444 (1990) (sobriety checkpoints), and *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976) (inland checkpoints to detect illegal aliens).

Yet as *Sitz* and *Martinez-Fuerte* make clear, a balancing analysis, not individualized suspicion, is the appropriate standard to assess reasonableness in checkpoint cases. Moreover, the city's checkpoints are virtually indistinguishable from those in *Sitz* and *Martinez-Fuerte,* both of which involved law-enforce-

ment as well as civil regulatory purposes. In addition, the line drawn by the Seventh Circuit between law enforcement and civil regulation is highly ambiguous. Indeed, the Seventh Circuit's distinction puts the judiciary in a position to trample the prerogative of the elected branches on when and how best to use law-enforcement resources. Finally, neither the text nor the history of the Fourth Amendment supports a higher standard of reasonableness for searches and seizures related to law enforcement. The Court should thus find the city's checkpoints constitutional.

ARGUMENT

I. THE REASONABLENESS OF THE CITY'S CHECKPOINTS SHOULD BE ASSESSED BY A BALANCING ANALYSIS AT THE PROGRAM LEVEL, NOT BY A SPECIAL-NEEDS TEST OR AN INQUIRY INTO INDIVIDUALIZED SUSPICION

The Seventh Circuit's decision turned on "whether reasonableness is to be assessed at the level of the entire program or of the individual stop." Pet. App. 3a. It conceded that the city's checkpoints, if evaluated at the program level, "probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops." *Id.*[2] Yet because it believes the city's checkpoints are "related to general criminal law enforcement" and not "to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders," the Seventh Circuit

[2] Of 1,161 vehicles stopped, the checkpoints have yielded fifty-five drug-related arrests and forty-nine non-drug-related arrests, an overall arrest rate of 9%. *Id.* at 2a-3a.

determined that reasonableness must be assessed at the level of the individual stop. *Id.* at 4a.

In support of its choice of standard, the Seventh Circuit wrote, "the Supreme Court has insisted that 'to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing,' save in cases of 'special need' based on 'concerns other than crime detection.'" *Id.* at 5a (citations omitted) (*quoting Chandler v. Miller*, 520 U.S. 305, 313-14 (1997)). Yet in *Chandler v. Miller*, the Court also noted that "[s]earches conducted without grounds for suspicion of particular individuals have been upheld, however, in 'certain limited circumstances.' These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, or at a sobriety checkpoint, and administrative inspections in 'closely regulated' businesses." 520 U.S. 305, 308 (1997) (citations omitted) (*quoting Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989)).

Chandler, which involved drug-testing of candidates for public office, is the progeny of the Court's other drug-testing cases, including *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1997) (drug-testing of high-school athletes), *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (drug-testing of customs agents), and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug-testing of railroad employees). The Court's disclaimer in *Chandler* is important, because it recalls that the drug-testing cases are not to be confused with checkpoint cases.

As the Court explicitly stated in *Michigan Dept. of State Police v. Sitz:*

> Respondents argue that there must be a showing of some special governmental need "beyond the normal need" for criminal law enforcement before a balancing analysis is appropriate, and that petitioners have demonstrated no such need.
>
> But it is perfectly plain from a reading of *Von Raab*, which cited and discussed with approval our earlier decision in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), that *it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. Martinez-Fuerte, supra*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas, supra*, are the relevant authorities here.

496 U.S. 444, 450 (1990) (emphasis added). Just as the respondents in *Sitz* erroneously suggested that the appropriate standard for the sobriety checkpoints in that case were to be found in *Von Raab*, a drug-testing case, the Seventh Circuit wrongly decided that the proper standard for the checkpoints in this case is to be found in *Chandler* and *Vernonia, Von Raab's* descendants. Because this is a checkpoint case, not a drug-testing case, the special-needs tests outlined in *Chandler, Vernonia, Von Raab*, and *Skinner* do not apply. Rather, the proper test is the balancing analysis used in other checkpoint cases, *Sitz* and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

The balancing analysis was more fully described by the Court in *Brown v. Texas* "'as a balance between the public interest and the individual's right to personal security free from arbitrary interference by

law officers.'" 443 U.S. 47, 50 (citations omitted) *(quoting Pennsylvania v. Mimms,* 434 U.S. 106, 109 (1977)). The Court added:

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to *arbitrary invasions solely at the unfettered discretion of officers in the field.* To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.*

443 U.S. 47, 51 (1979) (emphasis added) (citations omitted). In other words, the Court's worry is that individual officers not have arbitrary discretion to pick and choose whom they seize.

This concern was also expressed in *Delaware v. Prouse:* "The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents." 440 U.S. 648, 653-54 (1979). Thus, fixed checkpoints that limit the discretion of individual officers to stop vehicles fulfill the demands of reasonableness without individualized suspicion. The Court found the discretionary, roving traffic stops in *Prouse* to be unconstitutional while suggesting that "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663.

The city's checkpoints meet the requirements of *Sitz*, *Brown*, *Prouse*, and *Martinez-Fuerte*. Because they are "meant to intercept a completely random sample of drivers," Pet. App. 6a, they eliminate the prerogative of individual officers to decide which vehicles to seize. Furthermore, "the police endeavor to operate the checkpoints in such a manner that the stop does not exceed five minutes," *id.* at 2a, minimizing the duration of the seizure. The arrest rate at the checkpoints, 9%, *id.*, is much higher than the 1.6% in *Sitz*, 496 U.S. at 448, and the 0.12% in *Martinez-Fuerte*, 428 U.S. at 554.[3] All of these factors support the constitutionality of the city's checkpoints.

II. A DISTINCTION BETWEEN LAW-ENFORCEMENT AND CIVIL REGULATORY PURPOSES IS INSUFFICIENT TO DIFFERENTIATE THE CITY'S CHECKPOINTS FROM THOSE IN *MARTINEZ-FUERTE* AND *SITZ*

The Seventh Circuit attempted to distinguish the city's checkpoints from those in *Michigan State Dept. of Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), by drawing a line between law-enforcement and civil regulatory purposes. The cases do not fit into such neat categories, however. The city's checkpoints, like the Border Patrol's in *Martinez-Fuerte*, stop vehicular traffic at fixed locations to detect contraband. The Seventh Circuit claimed that the city's checkpoints have "no regulatory purpose that might be compared to that of the immigration laws, which seek to exclude and

[3] The checkpoint in *Sitz* yielded two alcohol-related arrests out of 126 vehicles stopped. 496 U.S. at 448. In an eight-day period at one of the checkpoints in *Martinez-Fuerte*, illegal aliens were found in 171 of 146,000 vehicles. 428 U.S. at 554.

deport illegal immigrants rather than just to prosecute them for criminal violations of the immigration laws." Pet. App. 10a.

This is a misreading of *Martinez-Fuerte*. The respondents in that case were not illegal aliens, but criminal defendants charged with illegal transportation of aliens seeking to suppress the testimony of those aliens under the exclusionary rule. *Martinez-Fuerte*, 428 U.S. at 547-50. Nor was the Court hesitant to describe *Martinez-Fuerte* as a law-enforcement case. As the Court explicitly declared, "Interdicting the flow of illegal entrants from Mexico poses formidable *law enforcement* problems." *Id.* at 552 (emphasis added).

The Seventh Circuit failed as well to perceive the potentially punitive nature of deportation. Most illegal aliens discovered by the checkpoints in *Martinez-Fuerte* were "simply deported without prosecution." *Id.* at 553 n.9. This does not necessarily imply the absence of a law-enforcement purpose, though. At just one of the checkpoints in 1973 alone there were 17,000 illegal aliens apprehended. *Id.* at 554. The refusal to prosecute might well have reflected a scarcity of judicial and corrective resources as well as a belief that expulsion from the country was in itself a not insubstantial penalty for many illegal aliens despite the non-criminal nature of deportation.

The Seventh Circuit also tried to differentiate the city's checkpoints from those in *Martinez-Fuerte* on the basis of "sovereign powers over foreign relations, foreign commerce, citizenship, and immigration" possessed by the federal government but not by state and local governments. Pet. App. 9a. Such considerations did not enter the Court's inquiry in *Martinez-Fuerte*, however. The ruling in *Martinez-Fuerte* was

based on the rationale that given the lesser expectation of privacy in an automobile and the minimal intrusion imposed by the stops, the public need to cope with illegal immigration justified the infringement on personal privacy:

> As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.

428 U.S. at 561-62 (citations omitted).

Further undermining the Seventh Circuit's contention that the Court's decision in *Martinez-Fuerte* was based on a distinction between federal as opposed to state and local power is the Court's observation that "[s]tops for questioning, not dissimilar to those involved here, are used widely *at state and local levels* to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters." *Id.* at 561 n.14 (emphasis added). As the Court pointed out, "this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway

use." *Id.* In other words, no special federal power was deemed to be exercised.

And it is strange for the Seventh Circuit to suggest that the Constitution grants the federal government more latitude in searches and seizures than it does state and local governments, given that the Fourth Amendment was put in place with the federal government in mind:

> Nor should we ignore the Fourth Amendment's image of federalism. The reasonableness requirement limited all federal officers, and the warrant clause imposed special restrictions on federal judges and magistrates, but vindication of these restrictions would largely come from state bodies. State statutes and state common law, after all, would typically define and protect ordinary individual's property rights to their "persons, houses, papers, and effects."

AKHIL AMAR REED, THE BILL OF RIGHTS 76 (1998). Given that the Seventh Circuit was unable to cite from *Martinez-Fuerte* any support for its contention of heightened federal powers, this point is easily dismissed.

In fact, it can be maintained that the city's checkpoints are more constitutionally defensible than those in *Martinez-Fuerte*. While the checkpoints in *Martinez-Fuerte* were solely for the purpose of discovering illegal aliens, the city's checkpoints rely in part on state and local governments' traditional and long-standing authority to query motorists about their licenses and registrations. 428 U.S. at 561 n.14. Moreover, given their much higher rate of arrests, the city's checkpoints have arguably brought more

benefits relative to the costs to the mobility and privacy of motorists. Pet. App. 2a-3a.

The Seventh Circuit likewise endeavored to contrast the city's checkpoints to those in *Sitz*, stating that "Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime." Pet. App. 9a. The city's checkpoints presumably visit a no more significant invasion of privacy on motorists than did those in *Sitz*. Additionally, the checkpoints in *Sitz* were established to detect signs of impairment, which are of course evidence of the crime of driving under the influence of alcohol. Intoxicated motorists in *Sitz* were not merely escorted home by officers. Like the offenders apprehended at the city's checkpoints, they were arrested and charged with a crime. 486 U.S. at 447-48.

The checkpoints in *Sitz* were devised not by civil regulators of highway safety, but by law-enforcement officials. The director of the Michigan State Police appointed a committee that included state and local police and state prosecutors, in addition to representatives of the University of Michigan Transportation Research Institute. *Id.* at 447. Further indication of a law-enforcement purpose can be found in crime statistics. According to Mothers Against Drunk Driving (MADD), 1.4 million people nationwide were arrested for driving under the influence (DUI) or driving while intoxicated (DWI) in 1997, "more than all other reported criminal offenses except larceny and theft." Approximately 513,200 offenders were sentenced to probation or incarceration in 1997. *MADD Statistics:*

DUI/DWI Arrests and Convictions (visited May 11, 2000) <http://www.mad.org/stats/stat_dui.shtml>.

Nor does the Court's analysis in *Sitz* support a distinction between law-enforcement and civil regulatory purposes. The Court explicitly adopted the framework from *Martinez-Fuerte* as well as *Brown v. Texas*, 443 U.S. 47 (1979). 496 U.S. at 450. Yet *Brown* was a criminal case involving the seizure of an individual who refused to answer a police officer's questions. 443 U.S. at 48-50. If the Court in *Sitz* had intended to make a distinction between searches and seizures related to law enforcement and those directed toward civil regulation, it presumably would not have relied on a standard from a criminal case in order to do so. It is also noteworthy that the Court in *Brown* cited *Martinez-Fuerte* for support, 443 U.S. at 51, dispelling the notion that *Martinez-Fuerte* is inapplicable in cases where the supposed primary purpose of the search or seizure is law enforcement.

Detecting drunk drivers, like discovering illegal aliens or, for that matter, narcotics traffickers, is a law-enforcement as well as a civil regulatory issue. The fact that there are laws against driving while intoxicated and smuggling illegal aliens, and that such practices are policed by law-enforcement officials and prosecuted in the criminal courts, only serves to further emphasize the arbitrariness of the Seventh Circuit's distinction.

III. THE CITY'S CHECKPOINTS RELATE TO THE CIVIL REGULATORY PURPOSE OF SECURING PUBLIC HEALTH AND SAFETY AS WELL AS TO A LAW-ENFORCEMENT PURPOSE

As *Michigan State Dept. of Police v. Sitz*, 496 U.S. 444 (1990) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), make clear, law-enforcement and civil regulatory purposes are not mutually exclusive. Indeed, law-enforcement resources are often employed in pursuit of civil regulatory goals. Drunk drivers are arrested and prosecuted not for law enforcement's own sake, but in furtherance of the civil regulatory purpose of securing public health and safety. The same can be said of the apprehension of narcotics traffickers at the city's checkpoints. The use of law enforcement as a means does not preclude the existence of a civil regulatory purpose.

Checkpoints are merely one method employed by the city to combat its drug problem. Anti-drug loitering ordinances, evictions of drug dealers from public housing, citizens' patrols, youth counseling and education, and other community outreach initiatives have also been used. U.S. Office of National Drug Control Policy, Drug Policy Information Clearinghouse, *Profile of Drug Indicators for Indianapolis, Indiana*, at 2-3 (Dec. 1999) <http://www. whitehousedrugpolicy. gov/stateandlocal/states/in/incprofiles.html>. The Seventh Circuit's conclusion that the checkpoints have primarily a law-enforcement purpose implies that catching drug smugglers is an end in itself. Yet it is presumably because narcotics are a threat to public health and safety that they are illegal.

There are abundant examples of the threat narcotics pose to society. Minors are frequent targets of drug dealers. Among juveniles arrested in Indianapolis in 1998, 31% of violent offenders tested positive for drug use, as did 43.6% of property offenders and 55.6% of offenders for other, non-drug-related offenses. Almost one half of all juveniles arrested in Indianapolis in 1998 tested positive for drug use. *Id.* at 5. Drugs are highly associated with violent crimes. In Indianapolis in 1998, 69.4% of males and 55.8% of females arrested for violent offenses tested positive for drug use. *Id.* at 4. This violence poses a threat to the health and safety of the rest of the populace, just as drunk drivers do to other motorists. Drug users are also known to commit property crimes to feed their addiction. In Indianapolis in 1998, 73.3% of males and 68.1% of females arrested for property offenses tested positive for drug use. Overall, 66.8% of males and 67.1% of females arrested in Indianapolis in 1998 for all crimes tested positive for drug use. *Id.* The implication is that drug interdiction increases public health and safety.

Indeed, the 4,476 narcotics-related arrests in Indianapolis in 1998 were more than double the city's 2,106 arrests for driving while intoxicated. *Id.* at 4. The city might reasonably perceive that narcotics pose at least as much concern for public health and safety as drunk driving. While the Court determined in *Sitz* that the use of law-enforcement resources to address one problem was constitutional, the Seventh Circuit decided in this case that use of law-enforcement resources to address the other is not. Referring to the balancing test in *Brown v. Texas,* 443 U.S. 47 (1979), the Court warned in *Sitz:*

> *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. . . . [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources, including a finite number of police officers.

496 U.S. at 453-54. While the Court in *Sitz* referred to a choice between law-enforcement alternatives, the judiciary should similarly be reluctant to substitute its beliefs in place of those of the elected branches of whether law-enforcement rather than other resources are best used in pursuit of a legitimate end.

It is precisely this sort of policy analysis to which courts are least suited. The Seventh Circuit presumed to understand better than Indianapolis itself whether narcotics trafficking was a sufficient threat to public health and safety to merit law enforcement. Particularly on the "very skimpy stipulation of facts" before it, Pet. App. 2a, it is questionable whether the Seventh Circuit was in a position to make such a determination. To grant courts such latitude invites judges to enact their own policy preferences. A judge sympathetic to the plight of illegal aliens might find the rationale for the checkpoints in *Martinez-Fuerte* unjustified. A judge skeptical of drug criminalization might be less willing to believe that the city's checkpoints address public health and safety.

This belies the more humble view of the judiciary, expressed by Alexander Hamilton, that the courts "have

neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST NO. 78, at 523 (Jacob E. Cooke ed., 1961).

IV. THE FOURTH AMENDMENT'S TEXT AND HISTORY PROVIDE NO BASIS FOR A HIGHER STANDARD OF REASONABLENESS FOR SEARCHES AND SEIZURES RELATED TO LAW-ENFORCEMENT PURPOSES

Neither the text nor the history of the Fourth Amendment supports a higher standard of reasonableness for law-enforcement searches and seizures. The Fourth Amendment was written to apply to all searches and seizures without regard to their purpose. Unlike the Fifth, Sixth, and Eighth Amendments, the Fourth Amendment does not explicitly refer to criminal matters in its text. Akhil Reed Amar, *Fourth Amendment First Principles,* 107 HARV. L. REV. 757, 757 (1994).[4] The absence is indication of the Fourth Amendment's universal applicability.

Besides the constitutional text, the experience of the people living at the time the Bill of Rights was adopted makes clear that such a distinction between

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"No person shall be held to answer for a capital, or otherwise infamous *crime* . . ." U.S. CONST. amend. V. (emphasis added).

"In all *criminal* prosecutions . . ." U.S. CONST. amend. VI. (emphasis added).

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual *punishments* inflicted." U.S. CONST. amend. VIII. (emphasis added).

law-enforcement and civil regulatory purposes is unwarranted. Searches and seizures for what might be deemed civil regulatory purposes were at the forefront of concern for colonial Americans. For instance, visits by the tax collector were considered no small affair in the late eighteenth century:

> The excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretence of searching for exciseable goods, that the duty has not been paid on, break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top; nay, they often search the cloaths, petticoats and pockets of ladies or gentleman, (particularly when they are coming from on board an East-India ship) and if they find any the least article that you cannot prove the duty to be paid on, seize it and carry it away with them; who are the very scurf and refuse of mankind, who value not their oaths, and will break them for a schilling.

A Farmer and Planter, MARYLAND JOURNAL, April 1, 1788, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 241-42 (Neil H. Cogan ed., 1997).

The colonists apparently feared the use of searches and seizures for the control of political activities as well. Perhaps the most influential case in this regard was *Wilkes v. Wood,* 98 Eng. Rep. 489, 498-99 (C.P. 1763), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 230-31 (Philip B. Kurland & Ralph Lerner eds., 1987). John Wilkes, a member of Parliament, had used the press to criticize the crown and the government. Officials obtained general warrants to search Wilkes'

home and personal papers and to arrest him. Wilkes successfully challenged the warrants in trespass, and he and the jurist who decided the case, Chief Justice Charles Pratt, later Lord Camden, became renowned throughout the colonies. AKHIL REED AMAR, THE BILL OF RIGHTS 65-67 (1998).[5]

The authors of the Bill of Rights also believed that the Fourth Amendment would aid in the preservation of other civil liberties, such as the freedoms of speech and press. Similar in legal prominence to *Wilkes v. Wood* was *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 233-35 (Philip B. Kurland & Ralph Lerner eds., 1987). In that case Lord Camden disapproved of the use of searches and seizures of papers, "often the dearest property a man can have," to exercise prior restraints on speech:

> If a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit.

Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in id.* at 235.

[5] Symbols of Wilkes and Lord Camden's popularity still exist. Wilkes-Barre, Pennsylvania, as well as counties in North Carolina and Georgia, are named for Wilkes. Lord Camden is still honored by the cities named for him in New Jersey, South Carolina, and Maine, as well as Camden Street in Baltimore, Maryland, from which the Baltimore Orioles' ballpark derives its name. AKHIL REED AMAR, THE BILL OF RIGHTS 66-67 (1998).

The link between other civil liberties and searches and seizures was not lost on the colonists:

> As yet you have the right to freedom of speech, and of publishing your sentiments. How long those rights will appertain to you, you yourselves are called upon to say, whether your houses shall continue to be your castles; whether your papers, your persons, and your property, are to be held sacred and free from general warrants, you are now to determine.

Centinel, No. 1, INDEPENDENT GAZETTEER (Philadelphia), October 5, 1787, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 238-39 (Neil H. Cogan ed., 1997).

This is not to suggest that searches and seizures for more mundane law-enforcement purposes were viewed unsuspiciously by the colonists. The abuse of general warrants to search for stolen goods was also viewed as a problem. *See, e.g., Reply to Wilson's Speech: "A Democratic Federalist,"* PENNSYLVANIA HERALD (Philadelphia), October 17, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 73-74 (Bernard Bailyn ed., 1993) (expressing worry about the conduct of an investigator entering a home at night with a warrant to search for stolen goods). Nor did Lord Camden view searches and seizures in aid of criminal law enforcement as a trivial issue:

> The justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and his strong reason to believe they are concealed in such a place; but if the goods are not found there,

> he is a trespasser; the officer in that case is a witness.

Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 234 (Philip B. Kurland & Ralph Lerner eds., 1987).

Rather, even a cursory reading of the relevant history reveals that colonial Americans did not consider searches and seizures concerned "primarily with catching crooks," Pet. App. 8a, to be a special category deserving greater scrutiny than searches and seizures in pursuit of civil regulatory aims. It is only in modern times that the rights of potential criminal defendants under the Fourth Amendment have outgrown those of persons subject to searches and seizures for other purposes. Such a distinction is textually and historically groundless.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

Daniel J. Popeo
Counsel of Record
Jeffrey S. Burk
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for *Amici Curiae*

May 15, 2000

Supreme Court, U.S.
FILED
JUL 05 2000
CLERK

No. 99-1030

In The
SUPREME COURT OF THE UNITED STATES

INDIANAPOLIS, ET AL.,
Petitioners,

v.

JAMES EDMOND, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

John W. Whitehead
Steven H. Aden
(Counsel of Record)
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

July 6, 2000

BEST AVAILABLE COPY

20 pp

QUESTION PRESENTED FOR REVIEW

Are checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk narcotics detection dogs around the exterior of each stopped automobile unlawful under the Fourth Amendment?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two important First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed *amicus curiae* briefs in many significant Supreme Court cases, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), *Illinois v. Wardlow*, 120 S.Ct. 673 (2000), and *Florida v. J.L.*,

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1 *Amicus curiae* The Rutherford Institute files this brief by consent of counsel for both parties. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety, with able assistance from law clerk Margaret W. Ng'ang'a (*J.D.* 2000, Louisiana State Univ. School of Law). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

120 S.Ct. 1375 (2000), and have also filed a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The Rutherford Institute is participating in *Indianapolis v. Edmond* as an *amicus* of the Court because it regards the case as a potential watershed in the Court's Fourth Amendment jurisprudence. The Institute recognizes that government at all levels, as well as the public as a whole, has a vested interest in the eradication of drug abuse. Nonetheless, the Court has a corresponding duty to ensure that the rights of private citizens are not run roughshod in violation of their Constitutionally guaranteed rights. In the words of Justice Stewart in *Coolidge v. New Hampshire*:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But values were those of the authors of our fundamental constitutional concepts.

403 U.S. 443, at 455 (1971) (plurality opinion).

In the view of The Rutherford Institute, the issue squarely before the Court is whether it will

now permit the expanding "special needs" exception to the Fourth Amendment's requirement of a warrant and probable cause to completely envelop the rule, by allowing police to engage in routine, suspicionless interrogational stops of citizens for the sole purpose of determining whether they are engaged in criminal conduct. The Court's *amicus* submits that America's history and jurisprudence have never (with the exception of times of war or national emergency) contemplated constitutional approval of a regime in which citizens may be arbitrarily stopped and demanded to "show your papers." The Rutherford Institute respectfully submits that if the City of Indianapolis' drug interdiction program is declared constitutionally permissible by this Court, the nation will inevitably be set on that course.

SUMMARY OF ARGUMENT

The use of canine "sniff" teams in Indianapolis' drug interdiction roadblock program is clearly targeted toward detecting the presence of illegal drugs on the person of the driver and his passengers, or within the compartment of the vehicle. Canine teams are thus proposed for a use that is not in furtherance of detecting *impairment* of a driver, but illegal drug *possession*, unlike the roadblock programs upheld by the Court as justified by interests of highway safety. Because canine police units detect controlled substances in locations not visible to the eyes of human officers, or within their olfactory capability, they must be deemed to be "searches" of passengers and vehicle

interiors subject to the Fourth Amendment's "reasonableness" requirement.

Checkpoint enforcement of a state's anti-drug laws is a criminal rather that a civil function of the police power. Thus the program in question must be characterized as a "general criminal law enforcement" program rather than a "primarily civil program for the protection of health, safety and the integrity or our borders." The checkpoints implemented by the City of Indianapolis were primarily set up to intercept narcotics traffickers in transit and not impaired drug users. The netting of intoxicated or impaired drivers, or drivers in violation of licensing regulations, is merely an ancillary benefit of the program. For these reasons, Petitioner's interdiction program does not involve a reasonable administrative search, and therefore the rationale of *Michigan v. Sitz* cannot be extended so far.

ARGUMENT

I. A CANINE SNIFF SEARCH OF A PERSONAL VEHICLE AND THE PERSONS AND CONTENTS THEREIN IS A "SEARCH" UNDER THE FOURTH AMENDMENT, AND MUST BE ASSESSED UNDER THE COURT'S STANDARD OF "REASONABLENESS UNDER THE CIRCUMSTANCES."

The subjection of persons and property to suspicionless canine searches is of highly doubtful constitutional validity. The Supreme Court has

addressed the constitutionality of canine sniff searches only once, nearly twenty years ago, in *United States v. Place*, 462 U.S. 696 (1983), and then only in dictum. *Place* involved an individualized sniff of an air traveler's luggage, which was seized and held for ninety minutes. 462 U.S. at 699. In holding that the detention unreasonably exceeded the scope of a permissible stop under *Terry v. Ohio*, 392 U.S. 1 (1968), the Court suggested in an aside that the canine sniff of the defendant's luggage was so limited in nature that it could not be deemed a "search" for Fourth Amendment purposes. *Place*, 462 U.S. at 707. Three members of the Court objected to the inclusion of this view by the majority on the ground that the issue had not been briefed or argued. *Id.*

Since *Place*, the Court has not readdressed this issue, nor applied or extended the dictum of *Place* beyond canine sniffs of luggage at airports based on individualized suspicion. The circuit courts of appeal, however, have struggled with the nature of canine sniffs in a variety of other contexts. *Compare United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985), *cert. den.*, 474 U.S. 819 (1985) (canine sniffs are searches, requiring balancing against legitimate expectation of privacy); *United States v. Liberto*, 660 F.Supp. 889 (D.D.C. 1987), *aff'd without op.*, 838 F.2d 571 (D.C. Cir. 1988) (dog sniff is a "search" but presumptively reasonable); with *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995) (narrowly applying *Place* dictum to permit vehicle roadblocks established for the separate lawful purpose of checking driver's licenses and

registrations could include canine sniffs of exterior of stopped vehicles); *United States v. Dovali-Avila*, 895 F.2d 206 (5th Cir. 1990) (canine sniffs are not searches); *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989) (same); *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984) (same).

The Second Circuit and the District of Columbia Circuit have squarely held that dog sniffs are "searches." *See* cases cited *supra*. The Second Circuit has refused to expand the *Place* dictum to sniffs on private property, holding that the defendants possessed a reasonable expectation of privacy in their closed residence that was violated by the warrantless sniff search. *United States v. Thomas*, 757 F.2d at 1366-67. In the D.C. Circuit, a warrantless sniff of a train passenger compartment was subjected to a Fourth Amendment balancing analysis, and the search upheld in view of the passenger's conduct that did not evidence an expectation of privacy in the compartment. *Liberto*, 660 F.Supp. at 891.

However, the Eleventh Circuit rejected the view that the Fourth Amendment is implicated by a suspicionless sniff search in *Merrett v. Moore*, 58 F.3d at 1553 n. 11, holding that "[t]he use of dogs on the exterior of ... cars constitutes no search." The Fifth, Ninth and Tenth Circuits have held likewise. *See* cases cited *supra*. The split in authority between the Second and D.C. Circuits, and the Eleventh and several other circuits, over the Fourth Amendment status of dog sniff searches warrants a revisitation by the Court of the *Place*

dictum and its application to situations outside the limited context of airports and public transportation.

The Court's *amicus* submits that it may be impracticable to impose a uniform rule for the Fourth Amendment status of canine searches in all circumstances, but at least where, as here, the use of canine units to detect drugs on persons as well as their vehicles absent individualized suspicion warrants analysis of the constitutional reasonableness of the program under the "totality of the circumstances" approach. For example, the Ninth Circuit recently ruled that a suspicionless canine sniff search of the student body of a public school constituted a Fourth Amendment "search," and that such a search was "unreasonable" because, in the absence of a record of a drug problem or crisis at the school, the government's important interest in deterring student drug use would not have been placed in jeopardy by requiring individualized suspicion. *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1268 (9th Cir. 1999), citing *Chandler v. Miller*, 520 U.S. 305, 314 (1997). Similarly, the Fifth Circuit held in *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982), that a school policy of canine drug sniffs of students was an unconstitutional "search" absent individualized suspicion, but that the sniffing of vehicles and lockers was not a "search" under the Fourth Amendment.

II. ON BALANCE, THE LEVEL OF INTRUSION THAT PETITIONER'S POLICE CHECKPOINTS IMPOSE IS NOT WARRANTED BY THE GOVERNMENTAL INTEREST PRESENTED HERE, HOWEVER COMPELLING IT MAY BE.

The Court has frequently observed that the Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). This Court has stressed that governmental intrusions on citizen privacy "should be judged by the standard of reasonableness under all the circumstances." *O'Connor v. Ortega*, 480 U.S. 709, 725-726 (1987). This standard requires a two-part inquiry: 1) Whether the search was "justified at its inception based upon reasonable, individualized grounds for suspecting the search will turn up evidence of misconduct," 480 U.S. at 726, citing *Terry v. Ohio*, 392 U.S. at 20; and 2) Whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place," 480 U.S. at 726, citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Rutherford Institute contends that the Petitioner's police detentions conducted in this case were unreasonable both at inception and in the scope of their interference with the right of privacy of the citizens of Indianapolis. The actions of Petitioner's police force raise the specter of wholesale law enforcement campaigns involving mass highway searches by canine units and

seizures of persons and personal property absent the protections of a warrant or individualized suspicion.

The Rutherford Institute submits that the Seventh Circuit properly applied the "special needs" analysis to Petitioner's roadblock program. As the Court of Appeals Court noted, it is difficult to quantify the benefits and costs of most law enforcement programs, and therefore permitting the program approach may result in deep inroads into personal privacy. *Palmer v. Goldsmith*, 183 F.3d 659, 662 (7th Cir. 1999). For this reason, courts do not typically assess reasonableness at the program level in cases such as this, where the search is related to general criminal law enforcement. *See Whren v. United States*, 517 U.S. 806 at 810 (1996). The Rutherford Institute suggests that this is such a program and not primarily a civil regulatory program for the protection of health, safety and the protection of the integrity of our borders. *E.g.*, *Michigan v. Tyler*, 436 U.S. 499, 504-06 (1978); *Martinez-Fuerte, supra*; *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574 (7th Cir. 1999). While there are cases wherein the police and other government officials have been allowed to impose on civilians in a manner similar to that perpetrated by the City of Indianapolis, those cases made it clear that allowing the imposition ultimately depended upon the powers of the Federal government over foreign relations. *See United States v. Martinez-Fuerte*, 428 U.S. 543; *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United*

States v. Ramsey, 431 U.S. 606 (1977); and *United States v. Johnson*, 991 F.2d 1287, 1290-92 (7th Cir. 1993). No such allowance has been made to the federal or State governments, or any of their administrative arms, with regard to the rights of American citizens within the nation's borders in non-immigration related matters.

The Petitioner's drug interdiction stops also cannot be characterized as "reasonable" in the scope of their intrusion on citizen privacy. Indianapolis' actions flout the central rule of *Terry* stop jurisprudence, that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Mendenhall*, 446 U.S. 554 (1980); *Florida v. Royer*, 460 U.S. 491, 500 (1983). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." 392 U.S. at 28. The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500.

Had the balancing test espoused by the Court in *Brown v. Texas*, 443 U.S. 47 (1979) been applied by the Seventh Circuit instead of the special needs analysis, Petitioner's drug interdiction program would nonetheless have been constitutionally

indefensible. In *Brown*, the court stated that "in the absence of any basis for suspecting [the defendant] of misconduct, the balance between the public interest and [defendant's] right to personal security and privacy tilts in favor of freedom from police interference." *Id.* at 50-53.

The City claims an interest in the detection and interception of drug trafficking. The costs to the motorists of Indiana are certainly substantial, in view of the time spent at the checkpoint, the inconvenience and the apprehension and invasion of privacy engendered. Notably, although the 'hit' rate was high at the checkpoints, the overall haul by the police of narcotic offenders was not high enough to justify the cost to the other motorists. Drug traffickers, who have historically displayed an ingenious capacity for creative evasion, are likely to wise up to the police program and devise new ways to circumvent it. This will leave innocent motorists stranded at checkpoints while the targets of the program avoid them altogether.

In reviewing police conduct in this area, the burden is upon the State to demonstrate the reasonableness of the scope and duration of the search in relation to its legitimate purpose. *Florida v. Royer,* 460 U.S. at 500. This view is consistent with general Fourth Amendment safeguards laid down by the Court in other contexts. Even a search incident to a lawful arrest must be limited in scope to that which is justified by the purposes served by that exception to the warrant requirement. 460 U.S. at 498. Likewise, the "hot pursuit" exception

to the warrant requirement permits the warrant requirement to be abandoned in the context of probable cause to arrest a fleeing suspect, but not reasonable suspicion to interrogate. *Johnson v. United States*, 333 U.S. 10 (1948). In Justice Brennan's words, the rule propounded by Petitioner would permit "law enforcement officers [to] release a trained cocaine-sensitive dog ... to roam the streets at random, alerting the officers to people carrying cocaine." *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting). The searches proposed by Petitioner are characteristic of "an extended hue and cry in and about [the] public streets" created by police, which the Supreme Court has condemned where no warrant or probable cause exists. *United States v. Santana*, 427 U.S. 38, 43 (1976).

CONCLUSION

The Fourth Amendment serves to protect all citizens, regardless of the good intentions of police officials or the relative efficacy of the law enforcement program in question. As Justice Scalia wrote for the Court in *Arizona v. Hicks*, 480 U.S. 321, 329 (1987), "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." Like the rains from heaven, constitutional rights fall on the just and the unjust. *See United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992). While the drug abuse crisis weighs heavily on the shoulders of law enforcement officers and legislators, the constitutional right to

freedom from arbitrary and groundless police stops and searches cannot be allowed to become a casualty of the war on drugs.

The Court's *amicus* respectfully submits that for the reasons set forth herein, the judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

John W. Whitehead
Steven H. Aden
(Counsel of Record)
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22906
(804) 978-3888

July 6, 2000

Supreme Court, U.S.
FILED
JUL 0 6 2000
CLERK

No. 99-1030

In The

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, and BART PETERSON, in his official capacity as Mayor of the City of Indianapolis, Indiana,

Petitioners,

v.

JAMES EDMOND and JOELL PALMER, on their own behalf and on behalf of a class of those similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

WESLEY MACNEIL OLIVER*
TULANE LAW SCHOOL
6329 Freret Street
Room 255-D
New Orleans, LA 70118
(504) 862-8810

Of Counsel:
BARBARA BERGMAN
CO-CHAIR, NACDL AMICUS COMMITTEE
UNIVERSITY OF NEW MEXICO SCHOOL OF LAW
1117 Stanford N.E.
Albuquerque, NM 87131
(505) 277-3304

Counsel of Record

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, the NACDL has almost 10,000 direct members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military defense counsel and law professors. NACDL has members in all fifty states, and the American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. AFD is a nationwide, non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices.

Among NACDL's and AFD's objectives is to deter overreaching by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. NACDL and AFD believe that this case may have a significant impact on the power of law enforcement personnel to intrude upon the lives of citizens it has no reason to suspect of any wrongdoing. Accordingly, NACDL

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[1] Both parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in party, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

and AFD file this brief in support of the Respondent to urge this Court to hold that a seizure for the purpose of criminal investigation requires an officer to first suspect the person to be seized is engaged in criminal wrongdoing. Further, NACDL and AFD urges this Court to recognize that the use of police dogs to test for the presence of narcotics on persons and property is a show of official force that often leads to false positives and therefore fruitless searches. To guard against what the decisions in the lower courts reveal to be an intolerable number of searches resulting from false positives by narcotics detection dogs, NACDL and AFD urge this Court to limit canine sniffs to situations where officers have reasonable suspicion to believe narcotics present.

SUMMARY OF ARGUMENT

In 1925, this Court announced that a roadblock to determine whether motorists were in possession of contraband alcohol would be an unreasonable seizure. *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). "It would intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.*

Fourth Amendment decisions since *Carroll* have reaffirmed that a roadblock to investigate the possibility motorists are committing a crime would be intolerable. This Court has recently recognized that a search or seizure is permitted only where the state has individualized suspicion of criminal wrongdoing or an important purpose other than prosecuting criminal wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997).

The roadblock in the instant case seizes every motorist absent any suspicion of wrongdoing to investigate the possibility the motorist is violating a criminal statute. The directives to officers in the Indianapolis roadblock indicate that the positive indication by the drug dog is but one way a full automobile search may occur. Probable cause may be developed independent of the dog sniff and officers may obtain consent to search the cars. No limits are placed on the types of questions that may be asked to obtain probable cause or the statements that may be used to prompt consent.

Even if the dog alert alone permitted a search of the automobiles stopped at this roadblock, the reliability of drug dogs on a random population is, at best, suspect. Cases litigated in the lower courts reveal that when dogs are asked to inspect those whom officers have no articulable basis to suspect, false positives can exceed 96 percent. *Merrett v. Moore,* 58 F.3d 1547, 1549 (11th Cir. 1995); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1263 (9th Cir. 1999).

A police dog is a show of force exceeding that required at a stop to ensure licensure or sobriety. *See United States v. Buchanon*, 72 F.3d 1217, 1225 (6th Cir. 1995) (recognizing that running a drug dog on a disabled car police were about to assist was a show of force requiring reasonable suspicion). The drug interdiction roadblock using a narcotics detection dog on every car is therefore a greater intrusion upon a motorist than a checkpoint to achieve the regulatory goals of ensuring motorists are licensed and sober. Even where the drug dog does not indicate the presence of narcotics, subjecting each citizen to a compelled intrusion aimed at his prosecution subjects him to this show of force unjustified by any suspicion.

Finally, a roadblock must limit the discretion of law enforcement officials responsible for its operation. *Delaware*

v. Prouse, 440 U.S. 648, 657 (1979). The Indianapolis drug checkpoint does not provide guidelines that tell an officer when he may seek consent to search a car -- though the directives inform the officer that he may seek consent to search a vehicle. The directives tell the officer he may search a car on probable cause but do not limit his attempt to obtain probable cause nor do they provide for a standard set of questions to ask all motorists. The type of interrogation an officer performs in his effort to obtain probable cause or consent can vary widely from motorist to motorist. The location of the roadblock is left to the decision of the police who are directed to assess crime rates in determining where the roadblocks shall be placed. Police are therefore afforded too much discretion to subject one portion of the community to an intrusion not visited on more affluent, more influential sections.

ARGUMENT

I. INDIVIDUALIZED SUSPICION IS REQUIRED WHENEVER THE GOVERNMENT'S OBJECTIVE IN A SEIZURE IS THE INVESTIGATION OF CRIME.

The stated purpose of the roadblock is to discover those committing the criminal offense of possession of narcotics. The directives to officers operating the roadblock describe the seizure as a "drug checkpoint." Drug Checkpoint Officer Directives, App. of Pet. Brief, 53a. The City of Indianapolis further admits in its brief that the purpose of the roadblock is criminal investigation. "To be sure, the City uses checkpoints to enforce the law." *See* Brief of Petitioner at 16. A drug dog circles each stopped vehicle to determine whether a seized motorist is in *possession* of contraband. Directives, ¶ 8, App. of Pet. Brief at 54a. The drug dog does not, as indeed it could not, determine whether the motorist is under the influence of an unlawful substance. The dog alerts only to the criminal act of possession -- an act that neither poses a public safety concern to those on the highway nor is the subject of civil regulation. *See Skinner v. Railway Labor Exec. Assoc.*, 489 U.S. 602, 633 (1989) (recognizing distinction between prosecutorial interest in discovering drug possession and public safety interest in discovering incidents of drug use by those in dangerous professions).

Absent suspicion of criminal wrongdoing, a search or seizure may not be conducted for the purpose of discovering evidence of a crime. "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individual suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997). The only exceptions to this rule occur when the government seeks goals "beyond the normal need for law

enforcement." *Id.* *See also Michigan v. Tyler,* 436 U.S. 499, 512 (1978); *Brown v. Texas,* 460 U.S. 730, 743 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976).

In several contexts this Court has recognized that intrusions without suspicion of wrongdoing must be justified by a goal other than the investigation of crime. In *Opperman*, this Court recognized that the police may inventory impounded automobiles "where the process is *aimed* at securing or protecting the car and its contents." *Id.* at 373 (emphasis added). Standardized procedures are required to assure that inventory searches are "limited in scope to the extent necessary to carry out the caretaking function" and not become "a pretext concealing an investigatory police motive." *Id.* at 375, 376. "Inventory searches... are not conducted in order to discover evidence of a crime." *Id.* at 383 (Powell, J., concurring).

Similarly, in *Brown* this Court permitted the introduction of evidence discovered in a roadblock to ensure that all motorists are licensed. The Court recognized, however, that there was "no suggestion that the roadblock was a pretext whereby evidence of narcotics might be uncovered in 'plain view.'" *Id.* at 743.

This Court in *Tyler* recognized that firefighters may investigate the origins of a fire to prevent further danger to persons or property absent probable cause of any wrongdoing. *Id.* at 510. A warrant is required to reenter a burned building after the blaze has been extinguished, but the magistrate issuing the warrant need only be assured that the intrusion is reasonably tailored to locating the origin of the fire, no suspicion of wrongdoing is required. *Id.* This Court, however, held that if firefighters wish to search for evidence of arson, or evidence linking an individual to an act of arson, probable cause would be required. *Id.* at 511-12.

Roadblocks, suspicionless seizures of automobiles, have been permitted where the government has been able to identify a goal separate from criminal enforcement, a valid public interest that is immediately served through the roadblock itself. Specifically, this Court has permitted a roadblock to ensure the integrity of international borders and to ensure the safety of the motoring public. These exceptions are consistent with the Court's recognition that when "concerns other than crime detection . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

A. Alien Checkpoints Secure National Borders.

The Framers recognized a distinction between border, or customs, searches and searches designed to discover evidence of wrongdoing. The Collections Act of 1789, Ch. 5, 1 Stat. 29,[2] provided in part for the mechanisms by which a ship could be searched. The First Congress considered these provisions of the Collections Act twelve days before James Madison presented the first version of what became the Fourth Amendment to the House of Representatives. The Act passed three weeks before Congress' final revision of the Amendment. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, 1491 (1990).[3] "The Collections Act explicated the Fourth Amendment, for both documents expressed the thoughts of the same persons on the same subjects." *Id.* at 1491-93.

The Collections Act made a distinction between a search to determine the nature of goods entering the country

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[2] Repealed by Act of August 4, 1790, ch. 35, § 74, 1 Stat. 145, 178

[3] Unpublished Ph.D. dissertation available from UMI Dissertation Services, 300 N. Zeeb Road, Ann Arbor, Michigan 48106.

by ship and a search for evidence of wrongdoing aboard ship. The Act permitted officers "of any port of entry or delivery, at which any ship or vessel may arrive to put [inspectors] on board" who shall specify "the marks and numbers of each package, and a description thereof." *Id.* at § 15, 1 Stat. at 40. The Act, however, in a separate section permitted officers to conduct a warrantless search of a vessel only when they had "reason to suspect any goods, wares or merchandise subject to duty shall be concealed." *Id.* at § 24, 1 Stat. at 43.

A quantum of suspicion to search for evidence of wrongdoing was required to search even at the border while an inventorying of items entering the border could proceed absent suspicion. "The statute distinguished these administrative acts from searches of ships that were triggered by a belief that dutiable goods were being concealed to avoid payment of taxes." Morgan Cloud, *Searching Through History; Searching for History*, 63 U. Chi. L. Rev. 1707, 1740-41 (1996). Further, as this Court has recognized, this statute is the first enactment of a long-recognized "right of the sovereign to protect itself by examining persons and property crossing into this country." *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

> [A] port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officials characteristically inspect luggage . . . it is an old practice intimately associated with excluding illegal articles from the country.

United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971). *See also United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985) ("the Fourth

Amendment balance between the interests of the Government and the privacy rights of the individual is struck much more favorably to the Government at the border"); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (recognizing unique interest of federal government at the border).

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court permitted a roadblock fifty miles from an international border to discover illegal aliens. The protection of the integrity of national borders is a function of government the Framers recognized was not limited by the usual pre-requisites to a search or seizure, a warrant and probable cause. As the United States has previously argued, the search for aliens is essentially a regulatory or administrative search as criminal prosecution is not the goal of the search, rather it is an interest in maintaining the integrity of its borders -- an interest the government vindicates most often without resort to the criminal process. *Almeida Sanchez v. United States*, 413 U.S. 266, 278 (1978) (Powell, J., concurring).

> The government further argues that [roving automobile searches in border regions for aliens] . . . are undertaken for administrative rather than prosecutorial purposes, that their function is simply to locate those who are illegally here and to deport them.

Id.

As this Court has recognized, the goal of discovering illegal aliens is civil deportation -- the possibility of criminal prosecution is rarely implemented. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984). "[O]nly a very small percentage of arrests lead to criminal prosecutions. Thus the arresting officer's primary objective, in practice, will be to use the [arrestee's post-arrest statements] in the civil

deportation hearing." *Id.* This type of roadblock therefore immediately served the regulatory goal of identifying those unlawfully in this country and commenced the process of their removal.

B. Sobriety Checkpoints Remove Potentially Deadly Drivers from the Highway

This Court has held that when officers act to protect the safety of the community, rather than investigate crime, the usual standards of suspicion are not prerequisites to a legitimate intrusion. For example, in *Cady v. Dombrowski*, 413 U.S. 433, 447-48 (1973), this Court recognized that officers acting to protect the public, as opposed to investigating crime, are performing community caretaking functions. In *Cady*, an officer entered the trunk of a disabled car towed to a garage as he believed the motorist, a Chicago police officer, was required to carry his service revolver at all times. *Id.* at 437. The officer checked the trunk to ensure the weapon he thought to be in the trunk would not be discovered by vandals once the car was impounded. *Id.* at 448. This Court held that when officers are performing community caretaking functions, such as protecting the public from weapons falling into the hands of criminals, the typical requirement of individual suspicion is not a prerequisite to the action.

Ensuring motorists are sober and therefore not posing a lethal threat to their fellow motorists is surely part of an officer's duty to protect the community. In *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), this Court permitted a roadblock to ensure that motorists were sober. The Court, in allowing the roadblock, weighed the state's interest in preventing the carnage caused by drunk drivers against the

minimal intrusion caused by the thirty second stop at a checkpoint. *Id.* at 451.

Certainly drunk driving is a crime and arrests were made for drunk driving at the roadblock considered in *Sitz*. *Id.* at 448. The State's interest in exacting possible sanction for driving under the influence, however, pales in comparison to the State's interest in removing drunk drivers from the highway before their impairment causes tragic, often fatal, accidents. Not unlike the interest advanced in *Martinez Fuerte*, the criminal component of the state's interest is ancillary to a regulatory goal -- here, the community caretaker function of making the highways safe.

C. Drug Checkpoints Prosecute the Criminal Act of Possession.

This Court has previously distinguished the regulatory interest in discovering those *using* drugs in dangerous occupations from the investigation of the crime of possessing drugs. For example, in permitting mandatory drug testing for railroad engineers previously involved in train accidents, this Court noted "the possession of unlawful drugs is a criminal offense that the Government may punish, but it is a *separate* and *far more dangerous* wrong to perform certain sensitive tasks while under the influence of those substances." *Skinner v. Railway Labor Exec. Assoc.*, 489 U.S. 602, 633 (1989) (emphasis added).

The purpose of the Indianapolis roadblock is the detection of those in *possession* of unlawful drugs. *See* Directives, App. of Pet. Brief, 53a.. The identification of those in possession of contraband narcotics commences the criminal charging process for this offense. Individual suspicion is therefore required for the seizure as the

governmental interest is sought through the drug interdiction checkpoint. *Chandler,* 520 U.S. at 513-14.

The United States, as *amicus curiae*, argues that the discovery of drug traffickers prevents further criminal acts by these individuals and other, particularly the distribution of drugs. Brief of the United States at 12 n.4. Incapacitation of the offender so that he may not commit further crimes against society and deterring others from doing the same are, however, two of the goals of criminal prosecution in all cases. *See* Wayne R. LaFave, *Criminal Law*, § 1.5(a), 24-25 (3d ed. 2000). The desire to prevent future crimes by those discovered to have committed one crime -- and the desire to prevent crimes by others -- does not therefore demonstrate an interest beyond that inherent in every criminal prosecution.

When the state seeks to intrude upon a citizen with no reason to believe him involved in wrongdoing, it is consistent with this Court's doctrines (and common sense) that the state only be allowed to do so when it is not subjecting him to a process that has as its aim his incarceration.

II. A MOTORIST MAY NOT BE SUBJECTED TO A DOG SNIFF ABSENT REASONABLE SUSPICION.

In a consent decree to eradicate racial profiling on the New Jersey Turnpike, the United States Department of Justice and the New Jersey State Police agreed that dog sniffs would be used on cars lawfully stopped only where there was a *basis* for using the dog. *See* Consent Decree, *United States v. New Jersey,* ¶¶ 32-33 (D.N.J.) (Civ. No. 99-5970 MLC) (visited May 21, 2000)<http://www.usdoj.gov/crt/split/documents/jerseya.htm>.

If the dog sniff were of no moment, as the City of Indianapolis and the United States assert, *see* Brief of Petitioner at 19; Brief of United States at 15; adding nothing to a detainee's uneasiness and posing no substantial risk of a false positive, this provision would unnecessarily inhibit law enforcement. That the New Jersey State Police and the United States Department of Justice agreed to this term is an implicit recognition of one of two important truths (and perhaps both). Dog sniffs subject the citizen to the state's machinery of criminal investigation which is an offensive act to a citizen not free to walk away. And dog sniffs pose a substantial risk of false positives resulting in fruitless and very invasive searches undermining a citizen's reasonable expectation of privacy and dignity.

A. A Dog Sniff is a Show of Force Requiring a Quantum of Suspicion.

A police dog at a roadblock adds a degree of official force and intimidation not present where officers merely check license and registration and ensure the driver is sober. Indeed, the Sixth Circuit has held that bringing a narcotics detection dog to the scene of a disabled car is a "show of force" indicating to a reasonable person that a drug investigation is underway with which the motorist may not interfere. *United States v. Buchanon*, 72 F.3d 1217, 1225 (6th Cir. 1995).

This Court has never authorized the use of a narcotics detection dog on property still in the lawful possession of someone authorities have no reasons to suspect of wrongdoing. In *United States v. Place*, 462 U.S. 702, 709 (1983), this Court held that a suspect's luggage had been detained by authorities for such a substantial length of time

that probable cause was required for the detention. The Court then recognized that a shorter detention of the luggage could be supported by a showing of reasonable suspicion, provided that the investigation performed on the detained luggage was "properly limited in its scope." *Id.* at 706.

It was in this context, where the police have a basis for separating a traveler from his luggage, that this Court noted that a dog sniff added nothing to the intrusion visited upon a suspect. *Id.* at 707. This Court did not say that property in the lawful possession of its owner may be sniffed at any time.

Bringing a police dog to an otherwise legitimate suspicionless encounter between an officer and citizen changes the legal nature of the encounter. In *Buchanon*, officers encountered the motorist as part of their efforts to assist him with his car trouble -- a legitimate basis for a suspicionless encounter of the officers with the motorist. The Sixth Circuit recognized, however, that directing a drug dog to sniff the disabled vehicle was an investigation of the motorist's property -- an investigation with which he may not interfere. *Buchanon*, 72 F.3d at 1225. "Bringing out the dog was a show of force . . . and when the sniff began, it would have been clear to a reasonable person that a drug investigation was underway and that troopers would not permit access to the vehicle during the dog sniff." *Id.* The Court held this show of force, during a function the officers doubtless had the right and responsibility to perform -- assisting a disabled motorist -- requiring reasonable suspicion. *Id.*

Whether the narcotic detection dog is viewed by the motorist as investigating him for criminal violations or a powerful show of the officer's authority and power, the police dog is clearly a sign of police power adverse to the motorist. When the purpose of the seizure is to investigate

the possibility he is committing a crime, the motorist is aware that he is treated as a suspect, that he is under a microscope where officer look for factors that suggest criminal activity sufficient to justify a search. And the investigative technique of a dog sniff demonstrates the officer's immediate physical authority not unlike his hand on a weapon.

Those who because of race, ethnicity, class, or prior unpleasant encounters with police have come to distrust the police would find this examination even more offensive and frightening. *See Illinois v. Wardlow*, 120 S.Ct. 673, 680-81 (2000) (Stevens, J., dissenting)(noting reasonable fear of the police by some segments of the community, particularly racial minorities). The vision of police dogs being let loose on civil rights marchers in Birmingham, Alabama is an image burned into the American conscience. *See* David Benjamin Oppenheimer, *Kennedy, King, Shuttleworth and Walker: The Events Leading to the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645, 671 (1995) (noting use of police dogs against marchers in Birmingham). This sad chapter in American history taints the current use of police dogs and instills fear in those who cannot forget the way these dogs have been used. The police dog simply is not a source of comfort to an innocent motorist seized in an official roadblock -- it is a show of force, a demonstration of the immediate physical power at the officers' disposal -- a power that history reminds us has not always been responsibly used.

B. The Inaccuracy of Dog Sniffs on a Random Population Demonstrates that Dog Sniffs Absent Reasonable Suspicion Yield an Intolerable Number of False Positives.

A narcotics detection dog is particularly unreliable when asked survey a random population. *See* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L. J. 405, 430 (1996-97).

This Court's has yet to authorize dog sniffs of random populations. Indeed it has not permitted the unwilling to be subjected to dog sniffs unless there has been, at least, a showing of individualized suspicion. *United States v. Place*, 462 U.S. 696, 706-08 (1983). The cases reported in the lower courts reveal that this Court should not permit the use of drug dogs absent individualized suspicion as the rate of false positives on a random population will lead to an intolerably high number of fruitless searches.[4]

Dogs are quite unreliable in indicating the presence of drugs in cars seized at roadblocks. In a roadblock in Florida, similar to the one in the instant case, the accuracy of the dogs was enhanced by requiring two separate dogs to alert on an automobile before a search could proceed. *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995). All cars on the Florida highway were stopped and drug detection dogs sniffed the outside of the cars while officers checked the license and registration of the motorists. *Id.* When a dog indicated the presence of narcotics, a second dog was brought to the automobile. Only if both the first and second dog alerted did a search occur -- consent was requested for a search on the second canine alert, if consent was not given, a warrant was obtained. Of the twenty eight cars searched using this method, only one search resulted in the arrest of a motorist for possession of illegal narcotics. *Id.* Thus, the alert of one drug detection dog -- confirmed by the positive alert by a second drug detection dog -- yielded fruitless searches in 27 out of 28 cases. *Id.* In other words, a roadblock, using a procedure even more carefully designed than the one in the

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[4] Certainly dog sniffs at airports and international borders would go unaffected by a reasonable suspicion prerequisite to a sniff as the full search permitted by a positive alert is permitted of any commercial airline passenger, *see National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (citing *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir.1974)), or international traveler. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971).

instant case, resulted in the search of an innocent person's car 96.4% of the time.

The use of dogs in school setting have similarly produced unreliable results when used on a population officers have no reason to suspect. In *B.C. v. Plumas Unified School District*, 192 F.3d 1260 (9th Cir. 1999), dogs were used to sniff high school students. Though there were positive indications by the drug dogs on students, no drugs were ever found. *Id.* at 1263. The false positive rate was therefore 100 percent.

In *Doe v. Renfrow,* 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part and remanded in part*, 631 F.2d 91 (7th Cir. 1980), students were randomly sniffed by narcotics dogs for drugs. Fifty positive indications by drug-detection dogs yielded only seventeen instances of actual narcotics possession. Thus, the police found no drugs on thirty-three individuals on whom the dogs alerted. On this random sample, the dogs were accurate in their alerts less than thirty-four percent of the time.

The fear of false positives when dogs are used on a random population is therefore very real.

> The judiciary should be most skeptical of sniffs conducted in a random, unfocused manner. All but the most carefully planned random sniffs using highly trained dog teams will likely result in many false positives.

Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.2(f), 63 n. 265.1 (quoting Bird, *supra*, 433-34).

Limiting dog sniffs to situations where officers have reasonable suspicion of the presence of narcotics reduces the number of fruitless searches the cases in the lower courts reveal to be all too common.

C. Many State Courts and Commentators Have Called for a Showing of Reasonable Suspicion Before a Dog is Permitted to Sniff

Lower courts have typically permitted dog sniffs only in cases where officers had reasonable suspicion to believe narcotics present before beginning the dog sniff. *See* LaFave, *supra,* at § 2.2(f), 456 (noting that with rare exceptions, courts have approved of dog sniffs only where reasonable suspicion existed that narcotics would be found in the place sniffed.) In cases where dog sniffs have been performed in the absence of reasonable suspicion, lower courts have approved the use of dogs primarily, if not exclusively, on closed containers or luggage at airports or other places where government inspection is anticipated. *People v. Unruh*, 713 P.2d 370, 377 (Colo. 1986) (*en banc*) (citing cases); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (citing *United States v. Edwards,* 498 F.2d 496, 500 (2d Cir. 1974) (recognizing that all commercial airline passengers may be searched absent individual suspicion)).

The Pennsylvania Supreme Court, not unlike many other state courts, [5] has regarded a dog sniff to be a search

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[5] Several other state courts have arrived at the same conclusion under their respective state constitutions. *See Pooley v. State*, 705 P.2d 1293, 1310-11 (Alaska App. 1985); *State v. Pellici*, 580 A.2d 710 (N.H. 1990); *People v. Unruh*, 713 P.2d 370 (Colo. 1986)(*en banc*). As many commentators have noted, this Court's decision in *Place* did not resolve the issue of whether a drug dog may be set loose on a citizen or his property absent suspicion of wrongdoing. *See* LaFave, *supra*, at § 2.2(f), 456. These from various state courts either make that assumption or

under the state constitutional protection against unreasonable searches and seizures. *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. 1987). Like other state courts, the Pennsylvania Supreme Court recognized that permitting a dog sniff only where officers had probable cause to believe drugs present would render the canine sniff of marginal utility at best. *Id.* at 79. The Court therefore recognized that probable cause was an inappropriate standard for dog sniffs but held that "a free society will not remain free if police may use this, or any other crime detection device, at random and without reason." *Id.* Because the dog sniff was "inherently less intrusive than other searches," the Court found the appropriate balance between the needs of criminal enforcement and individual's freedom from unwarranted criminal investigations to be struck by the prerequisite of reasonable suspicion. "[A]n individual's interest in being free from police harassment, annoyance, inconvenience and humiliation is reasonably certain of protection if the police must have a reason before they may... utilize a dog." *Id.* at 80.[6]

Many commentators have similarly labeled the dog sniff an investigative technique which subjects its targets to a humiliation and potentially offensive police encounter. Recognizing nevertheless that the intrusion is minimally intrusive, these commentators analogize the encounter to a *Terry* stop, another investigative technique that subjects a citizen to a potentially undesirable encounter. *See* LaFave, *supra*, § 2.2(f), 461; Note, Kenneth L. Pollack, *Stretching the* Terry *Doctrine to the Search for Evidence of Crime: Canine*

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recognize the reasonable suspicion requirement irrespective of the federal minimum.

[6] The Court noted that a dog sniff was "unlikely to intrude except marginally upon innocent persons." *Id.* at 79-80. To the contrary, when drug dogs are used on a random population, as discussed above, the cases litigated in the lower courts indicate frequent intrusions on innocent persons.

Sniffs, State Constitutions and the Reasonable Suspicion Standard, 47 Vand. L. Rev. 803 (1994).

Requiring reasonable suspicion as a prerequisite to a dog sniff is that it reduces the risk of a false positive and does not subject an innocent citizen to the accusational nose of a police dog without a basis.

III. THE INDIANAPOLIS ROADBLOCK DOES NOT ADEQUATELY LIMIT THE DISCRETION OF POLICE OFFICERS.

Where suspicionless automobile seizures have been permitted, this Court has required a limitation on officer discretion at the roadblock so that officers may not arbitrarily decide how invasive the intrusion shall become or arbitrarily subject some to the initial seizure but not others. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450-51 (1990) (all cars entering roadblock must be checked in same manner); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (recognizing that roadblock where all cars were briefly stopped to ensure licensure could be reasonable intrusion).

The directives to officers performing the Indianapolis Drug Interdiction Roadblock do not adequately supply guidelines that assure equal treatment of all stopped motorists. Neither the directives to officers running the roadblock nor the affidavits the City of Indianapolis presented to the District Court provide adequate assurances that all motorists are equally likely to be seized in the checkpoints.

A. The Directives Do Not Adequately Limit the Extent or Manner of Investigation Officers May Perform at the Checkpoint.

The directives to officers operating the Indianapolis roadblocks further reveal that an indication by a trained drug dog is not the only way an officer may gain the right to search a motorist's car. The directives note that a motorist's voluntary consent to search will permit a search, even without a positive indication by the drug dog.[7] Probable cause can be developed during the officer's interaction with the motorist even absent a positive indication by a drug dog. As the directives read:

> A warrantless search of a vehicle is permitted if the person in control of the vehicle gives a valid consent to search. The officer may not overbear the will of the person consenting. . . .
>
> A warrantless search of a vehicle is also permitted if the officer has probable cause to believe the vehicle contains contraband, evidence, or fruits of a crime.

App. of Pet. Brief at 53a.

In a regulatory search, a search for non-criminal purposes, officials will stop when the inspection is complete -- an intrusion circumscribed by a clear goal. The inspection is complete when the wiring of a dwelling has been

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[7] While this Court has recognized that a voluntary consent to search a car permits an officer to conduct a search, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 227-34 (1973), this Court has never permitted a suspicionless seizure so that the officer may request consent of the seized motorist.

examined, *see Camara v. Municipal Court*, 387 U.S. 523 (1967), or when the vehicle identification numbers of cars at a vehicle dismantling plant have been examined. *See New York v. Burger*, 482 U.S. 691 (1987). "[B]ecause the inspections are neither personal in nature nor aimed at the discovery of evidence of a crime, they involve a relatively limited invasion of the... citizen's privacy." *Camara,* 387 U.S. at 537.

A search for evidence of criminal activity is necessarily less circumscribed -- there is no discrete place where all citizens place incriminating evidence or contraband. The intrusion by the state in these circumstances is simply greater than when a clearly defined regulatory task is being performed. No direction is provided to the officer indicating when he may ask the motorist to consent or what sort of questions he may ask in his efforts to obtain probable cause by some means other than a canine sniff. Admittedly the directives instruct the officers that "all *cars* are to be examined in the same manner." Directives, App. of Pet. Brief at 54a. The directives nevertheless expressly state that the officer may obtain consent to search the vehicle or search the vehicle when he has probable cause -- the methods by which the officer may attempt to develop probable cause are not limited by the directives. The directives do not tell the officer whether he is to seek consent to search from all motorists, some or none. The directives do not instruct the officer on the questions or statements he can or should use to obtain consent or the questions he can or should ask of motorists in an attempt to develop probable cause.

If consent is given or probable cause discovered, a very intensive search ensues -- an intrusion not visited on those from whom officers do not seek consent or attempt to develop probable cause. The search of a car for drugs could, and often does, involve removing floor mats, spare tires, and door panels. *See United States v. Zapata*, 180 F.3d 1237,

1243 (11th Cir. 1999) (consent to search car for weapons or drugs permits removal of door panels); *United States v. Pena*, 920 F.2d 1509, 1514 (10th Cir. 1990) (finding consent to "look in" a car allowed officer to remove door panels); *United States v. McRae*, 81 F.3d 1528, 1537-38 (10th Cir. 1996) (finding consent to "look in" a car included lifting carpet in the trunk); *United States v. Gigley*, 213 F.3d 509 (10th Cir. 2000) (consent to "look in" van permits officers to look under rear middle seat).

The goal of the police is not a search tailored to a regulatory goal such as an examination of the driver's license. The admitted purpose is the discovery of drugs which may be hidden anywhere in a car. The directives to Indianapolis police officers operating these drug interdiction roadblocks permit these very intrusive searches to be sought of some but not others -- with no basis for the differentiation.

B. The Directives Do Not Adequately Limit the Discretion of Law Enforcement Officials Determining Where the Roadblocks Shall Be Placed.

The Fourth Amendment establishes a warrant requirement which is waived only when significant exigencies prevent obtaining a warrant. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The fact that a search or seizure may occur on something less than (or, more precisely, *other* than) probable cause, does not eliminate the warrant requirement in the absence of an exigency. *See Camara v. Municipal Court*, 387 U.S. 523 (1967); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). The location of a roadblock therefore should require the same sort of judicial approval required when the government seeks a suspicionless regulatory intrusion.

The instant case provides a classic example of the need for judicial supervision of the investigatory process. The City of Indianapolis asserts that supervisory level officials determine the location of the roadblock in advance. Affidavit of Marshall Depew, App. 57a. The determination is to be made based on crime rates and extent to which the location will affect traffic. *Id.*

The point of a roadblock -- as opposed to random suspicionless stops of motorists -- is that a cross-section of the community is subjected to the same intrusion. *See Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (requiring stop of all automobiles if suspicionless seizure is sought). Officers may not target individual motorists or groups of motorists without suspicion. *Id.* If all persons are equally subject to the same chance of a seizure at a checkpoint, the powerful and the outcast, then the decision of whether a short seizure is a good policy can be entrusted to the political process. Those who legislate and influence police policy are as likely to be seized by a checkpoint as anyone else. See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L. J. 19, 93 (1988) (arguing that Fourth Amendment provides for equal protection from searches and searches so that democratic process will be responsive to claims that intrusions applicable to all are bad policy).

Where police officers, even at the supervisory level are permitted to establish the checkpoint's location, they can place the checkpoint in an area that lacks influence. Further, nothing in the stipulations entered in the District Court prevents the checkpoints from being operated in precisely the manner the Respondents alleged in their complaint. A sign along the highway warns of a drug checkpoint further down the highway while the actual checkpoint is discretely hidden at the bottom of the next exit ramp. J.A. at 8. Those with something to hide from authorities naturally exit.

The supervisory officer can select a community that lacks political influence and corral those with drugs off the interstate onto the exit ramp leading to this community. A high hit rate generated, not by the community's indigenous drug problem, but by the signs alerting drug carriers of the impending roadblock, confirms that the supervisory officer has correctly located a "high crime area."

This Court has continued to require a warrant for intrusions that can be conducted without a warrant to ensure that regulatory agencies follow standard, non-discriminatory procedures in all cases. *See Camara v. Municipal Court,* 387 U.S. 523 (1976); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). Drug interdiction roadblocks have the potential to be allocated based on hunches about segments of the community and drug use -- hunches that will subject perfectly innocent citizens to intrusions on their liberty because of their race or class -- intrusions wealthier communities are less likely to experience. The location of this type of suspicionless intrusion is therefore especially appropriate for judicial supervision.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

WESLEY MACNEIL OLIVER*
TULANE LAW SCHOOL
6329 Freret Street
Room 255-D
New Orleans, LA 70118
(504) 862-8810

Of Counsel:
BARBARA BERGMAN
CO-CHAIR, NACDL AMICUS COMMITTEE
UNIVERSITY OF NEW MEXICO
SCHOOL OF LAW
1117 Stanford N.E.
Albuquerque, NM 87131
(505) 277-3304

* *Counsel of Record*

July 6, 2000

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